

REPORT
OF THE
COMPANY LAW COMMITTEE
1952



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CONTENTS

PART I

INTRODUCTORY AND PRELIMINARY

<i>Chapter</i>	<i>Pages</i>
I—INTRODUCTORY	3—9
Need for revision of the Indian Companies Act	
Examination of the question by legal experts	
Preparation and circulation of a Memorandum of Amendments	
Appointment of Committee and terms of reference	
Preliminary work	.
Appointment of a Sub-Committee	.
Examination of witnesses	.
Report of the Sub-Committee	
Consideration of the Sub-Committee's report	
Structure of the Report	
Co operation by State Governments and trade and industry	
Acknowledgment of services of the Member-Secretary and staff	
 II—THE NATURE AND SCOPE OF THE ENQUIRY	 10—15
Approach to the problem	
Limitations of the enquiry	
Objectives	
Problems of economic policy and industrial management outside scope of enquiry	
Role of joint stock companies in economic development	.
 III.—GROWTH AND DEVELOPMENT OF COMPANY LAW IN INDIA	 16—20
First Companies Act in India	
Salient features of earliest company legislation	
Indian Acts between 1857 and 1913	
Act VII of 1913	. . .
Act XXII of 1936	. . .
Subsequent amendments	. . .
Need for reform to remove evils manifesting after World War II	. . .
Need for comprehensive amendment and consolidated legislation

PART II

PRINCIPAL RECOMMENDATIONS RELATING TO AMENDMENT
OF THE INDIAN COMPANIES ACT, 1913

<i>Chapter</i>	<i>Pages</i>	<i>Paras.</i>
IV—DEFINITIONS AND JURISDICTION	23—27	
Definitions		27
Certain additional terms defined .		28
Nationality of directors of companies		29
Position of professional advisers		30
Jurisdiction of the Courts		31
V—CONSTITUTION AND INCORPORATION OF COMPANIES	28—31	
Alteration of memorandum of association		33
<i>Articles of Association</i>		
Certain regulations to be adopted by all com- panies!		34
Managing agency agreement to form part of articles		35
Names of companies .		36
<i>Associations not for profit</i>		
Exemption of associations not for profit from filing certain returns		37
Eligibility of firms for membership of asso- ciations not for profit!		38
VI—SHARES AND SHARE CAPITAL	32—40	
<i>Register of members and the annual return</i>		
Relationship between holding company and its subsidiaries		40
Full disclosure of information in register of members and annual return		41
<i>Transfer of shares</i>		
Directors' right to refuse transfer of shares .		42
Powers to refuse transfer to remain with directors subject to right of appeal of transferor or transferee		43
Definition of "scrips"		44
Certification of shares .		45
Share-warrants		46

VI—*concl'd**Classes of shares*

Present voting rights attached to different classes of shares	47
Future classification of shares and rights to be attached to each class	48
Power of Central Authority to relax the general rules in special cases	49

Alteration in share capital

Provision of funds for purchase of shares for benefit of employees and loans to employees	50
Power to Court of dispense with formalities relating to settlement of creditors' objections to reduction of capital	51
Further issue of capital	52

VII—PROSPECTUS, MINIMUM SUBSCRIPTION AND ALLOTMENT OF SHARES

41—52

Full disclosure in prospectus and balance sheet and accounts	53
Relative provisions in United Kingdom and South Africa	54

Prospectus

Contents of prospectus	55
Relaxation of provisions relating to contents of prospectus	56
Other sections relating to prospectus contained in item 20 of the Addendum	57
Matters to be stated and reports to be set out in prospectus	58
Expert's consent to issue of prospectus containing statement by him	59
Registration of prospectus	60
Civil liability for mis-statements in prospectus	61
Criminal liability for mis-statements in prospectus	62
Interpretation of provisions relating to prospectus	63
Prohibition of allotment unless minimum subscription received	64
Prohibition of allotment in certain cases unless statement in lieu of prospectus filed	65

<i>Chapter</i>	<i>Pages</i>	<i>Paras.</i>
VII—concl'd		
Effect of irregular allotment		66
Application for, and allotment of shares, and debentures		67
Allotment of shares and debentures to be dealt in on stock exchange		68
Sanction to issue of capital to be subject to prospectus conforming to statutory requirements		69
VIII—COMPANY MEETINGS AND PROCEEDINGS	53—60	
Ineffective control by shareholders over affairs of company		70
Possible remedies		71
<i>Annual general meeting</i>		
Statutory meeting		72
Annual general meeting		73
<i>Procedure at general meetings</i>		
Importance of the annual general meeting		74
Provisions as to meetings and votes . . .		75
General meeting requisitioned by shareholders		76
Proxies		77
Resolutions and notices		78
Minutes of meetings		79
IX—MANAGEMENT OF COMPANIES—DIRECTORS AND THEIR POWERS	61—81	
Pivotal position of directors		80
Directors regarded as agents and trustees of company		81
<i>Appointment of directors</i>		
No body corporate to be appointed director		82
Number and nationality of directors . . .		83
<i>Constitution of board of directors</i>		
Election as directors of nominees of or persons under influence of managing agent		84
Individual voting of directors casual vacancies		85
Qualifications and conditions of appointment of directors		

<i>Chapter</i>	<i>Pages</i>	<i>Paras.</i>
IX—concl'd		
Remuneration of directors		87
Remuneration of directors or other officers not to be tax free		88
Compensation for loss of office		89
Age of directors		90
Number of directorship which a director can hold		91
Disqualification of and vacation of office by directors		92
Company (other than a private company) to be debarred from prescribing additional grounds for vacation of director's office		93
Disqualification on certain other grounds from acting as director, etc		94
Assignment of office by director		95
Disclosure of directors' interests		96
Register of contracts, etc, in which director is interested		97
Prohibition of voting by interested directors		98
Disclosures to members in case of contract appointing a manager or managing director		99
Dealings in company's shares by directors		100
General powers of directors for management and supervision		101
Restrictions on the general powers of directors		102
Disposal of sale proceeds of undertaking acquired by Government or local authority		103
Borrowing by directors on security of assets of company		104
<i>Restrictions on some special activities of directors</i>		
Desirability of imposing limits on directors' activities		105
Loans to directors		106
Office or place of profit in a company or its subsidiary		107
Sale, purchase or supply of goods by director to company		108
Board meetings		109
Record of proceedings of directors' meeting		110
Retirement and removal of directors		111
Register of directors, managers and managing agents		112

<i>Chapter</i>	<i>Pages</i>	<i>Paras</i>
X —MANAGEMENT OF COMPANIES—MANAGING AGENTS, MANAGING DIRECTORS AND MANAGERS .	82—112	
Controversy over managing agency system in the past .		113
Origin of managing agency system		114
Continuance of the system need for tightening up of relevant provisions of the Act		115
<i>Appointment of managing agents—</i>		
Limited companies may act as managing agents private managing agency companies not to be managed by managing agents .		116
Duration of appointment		117
Termination of existing managing agency agreements		118
<i>Conditions of employment of managing agents</i>		
Removal of managing agents		119
Transfer of office of managing agent		120
Resignation of office by managing agent		121
Transfer of managing agency in case of firm or limited company		122
Variation in managing agency agreements		123
Compensation to managing agents		124
<i>Remuneration of managing agents</i>		
Method of remunerating managing agents		125
Quantum of remuneration		126
Minimum remuneration		127
Office allowance		128
Prohibition of payment of additional remuneration		129
Definition of “net profits”		130
Managing agent not to hold office of profit in managed company		131
Managing agent to draw remuneration after accounts have been passed		132
Application of the new provisions to existing companies		133
General powers of managing agents		134

X—*conold**Restrictions on some activities of managing agents*

Need for closing loopholes in the existing provisions of the Act	135
Loans to managing agent	136
Current account	137
Loans to or by companies under the same management	138
Purchase by company of shares of company under the same managing agent	139
Managing agent not to engage in competitive business with a managed company	140

Purchase and sale by managing agents on behalf of managed companies

Appointment of managing agent as buying or selling agent	141
Commissions on purchases and sales by managing agent	142
Commissions from third parties	143
Contracts between managing agent and managed company regarding sale, purchase, etc	144
Managing agent to render accounts to managed company of all remuneration received otherwise than under terms recommended termination of existing contracts regarding purchase, sale, etc.	145
Managing directors and managers	146

XI—ACCOUNTS AND AUDIT

113—132

Advanced character of the accounts and audit provisions of the Indian Companies Act	147
---	-----

Accounts and audit provisions of the English Companies Act, 1948

Contents of the Eighth Schedule in the English Companies Act, 1948	148
Nature of the balance sheet and the profit and loss account under the English Companies Act, 1948 .	149
Exceptions in favour of banking and discount companies in the English Companies Act, 1948	150

XI—cont'd

Audit provisions in the English Companies Act, 1948	151
Need for fullest possible disclosure in balance sheet and profit and loss account	151
<i>Form of balance sheet and schedule relating to the contents of profit and loss account</i>	
Nature of the form of balance sheet and profit and loss account recommended by the Committee	15
Nature of the books of account to be kept by a company	15
Form and contents of the balance sheet that the Committee recommends	15
Debts outstanding for more than three months to be treated as loans or advances	15
Contents of the schedule relating to the profit and loss account which the Committee recommends	157—1
Managing agent and other persons to be required to make certain disclosures for purposes of balance sheet and profit and loss account	1
Power of the proposed Central Authority to vary the requirements relating to the balance sheet and the profit and loss account	1
Form of balance sheet and schedule relating to profit and loss account designed to give the fullest possible information	
Group accounts	
Writing up of assets	
<i>Other recommendations relating to the balance sheet and the profit and loss account.</i>	
Limit of time for the preparation of the balance sheet and the profit and loss account	
Responsibility for preparation of the balance sheet and the profit and loss account and the manner in which they should be circulated	
Obligation of private companies to file copies of balance sheets with the Registrar	

<i>Chapter</i>	<i>Pages</i>	<i>Pages</i>
XI—<i>concid</i>		
Special provisions for the preparation of the balance sheet and the profit and loss accounts of holding companies		169
Directors' report		170
<i>Audit and auditors</i>		
Qualifications of auditors		172
Certain categories of persons to be disqualified from appointment as auditors		173
Chartered accountant or partner of his firm to sign auditor's report and financial statement of company		174
Appointment, reappointment, removal, etc , of auditors		175
Position of auditors <i>vis a vis</i> the management and shareholders		176
Auditor's right to receive notice, etc , of and attend, general meetings		177
<i>Powers and duties of auditors</i>		
Right of auditor to call for information from directors and officers of company		179
Auditor to certify that accounts give a true and fair view of company's affairs		180
Form of auditors' report		181
Recommendations designed to give auditors appropriate position and status		182
XII—INSPECTION AND INVESTIGATION	133—152	
<i>Existing law on inspection and investigation of companies</i>		
Investigation into affairs of company		183
Enforcement of the existing provisions re- garding inspection and investigation		184
Powers of investigation and inspection		185
Existing powers of Registrar to report on a company's affairs		186
Shareholders' right to apply to Government to appoint inspector		187
A critique of the existing position		188
Defects in the present position		189

I—*contd*

Audit provisions in the English Companies Act, 1948	151
Need for fullest possible disclosure in balance sheet and profit and loss account	152
<i>Form of balance sheet and schedule relating to the contents of profit and loss account</i>	
Nature of the form of balance sheet and profit and loss account recommended by the Committee	153.
Nature of the books of account to be kept by a company	154
Form and contents of the balance sheet that the Committee recommends	155
Debts outstanding for more than three months to be treated as loans or advances	156
Contents of the schedule relating to the profit and loss account which the Committee recommends	157—158
Managing agent and other persons to be required to make certain disclosures for purposes of balance sheet and profit and loss account	159
Power of the proposed Central Authority to vary the requirements relating to the balance sheet and the profit and loss account	160
Form of balance sheet and schedule relating to profit and loss account designed to give the fullest possible information	161
Group accounts	162
Writing up of assets	163
<i>Other recommendations relating to the balance sheet and the profit and loss account.</i>	
Limit of time for the preparation of the balance sheet and the profit and loss account	166
Responsibility for preparation of the balance sheet and the profit and loss account and the manner in which they should be circulated .	167
Obligation of private companies to file copies of balance sheets with the Registrar	168

<i>Chapter</i>	<i>Pages</i>	<i>Paras</i>
XI—<i>conci</i>d		
Special provisions for the preparation of the balance sheet and the profit and loss accounts of holding companies		169
Directors' report		170
<i>Audit and auditors</i>		
Qualifications of auditors		172
Certain categories of persons to be disqualified from appointment as auditors		173
Chartered accountant or partner of his firm to sign auditor's report and financial statement of company		174
Appointment, reappointment, removal, etc , of auditors		175
Position of auditors <i>vis-a vis</i> the management and shareholders		176
Auditor's right to receive notice, etc , of and attend, general meetings		177
<i>Powers and duties of auditors</i>		
Right of auditor to call for information from directors and officers of company		179
Auditor to certify that accounts give a true and fair view of company's affairs		180
Form of auditors' report		181
Recommendations designed to give auditors appropriate position and status		182
XII—INSPECTION AND INVESTIGATION	133—152	
<i>Existing law on inspection and investigation of companies</i>		
Investigation into affairs of company		183
Enforcement of the existing provisions regarding inspection and investigation		184
Powers of investigation and inspection		185
Existing powers of Registrar to report on a company's affairs		186
Shareholders' right to apply to Government to appoint inspector		187
A critique of the existing position .		188
Defects in the present position .		189

	<i>Pages</i>	<i>Paras</i>
<i>-concl'd.</i>		
<i>Proposed changes in law</i>		
Adoption of the provisions of sections 164-171 of the English Act with suitable modifi- cations	190	
Person accused of any offence under the Act to be a competent witness in proceedings relating to such offence in a Court of law	191	
Schematic representation of the above recommendations	192	
Likely increase in number of investigations consequent on acceptance of proposals	193	
Initiative in matters of investigation to rest with Central Authority	194	
<i>Investigation of ownership of shares</i>		
Real ownership of shares	195	
Nominee holding of shares	196	
Proposals for the future	197	
<i>Minority interests and the Court's powers in case of oppression by majority or gross mismanage- ment</i>		
Oppression of minority and gross mismanage- ment	198	
Safeguards against oppression or mismanage- ment	199	
Departure from relevant provisions of the English Act	200	
Ineligibility of managing agent to act as such in certain circumstances	201	
Desirability of reviewing certain provisions of the Amendment Act of 1951 relating to complaints against management of company	202	
Safeguard against frivolous or vexatious prose- cution under the Act	203	
I—WINDING UP	153—164	
Amendments made by the Act of 1936 relating to winding up	204	
Committee's recommendations regarding winding up mainly procedural	205	
Liability of a contributory	206	

<i>Chapter</i>	<i>Pages</i>	<i>Paras</i>
XIII—concl'd.		
Jurisdiction in winding up cases		207
Application for winding up		208
Petition by official receiver or Central Authority for winding up		209
Commencement of winding up by the Court		210
Powers of the Court on hearing petition		211
<i>Liquidators</i>		
Remuneration of liquidators		212
Permanent official liquidators to be attached to Courts		213
Registrars to be kept informed of changes in office of liquidator		214
Liquidator to call creditors' meeting in certain circumstances		215
Declaration of solvency and calling of creditors' meeting		216
Disqualification for appointment as liquidator		217
<i>Preferential payments and fraudulent preference</i>		
Preferential payments		218
Fraudulent preference		219
Offences antecedent to or in course of winding-up		220
Winding-up rules		221
Re-arrangement of the provisions relating to winding-up		222
XIV—FOREIGN COMPANIES	165—167	
Adaptation of the provisions of the English Act		223
Principal changes		224
XV—MISCELLANEOUS PROVISIONS	168—175	
<i>Information as to mortgages, charges, etc</i>		
Registration of floating charges register of mortgages		226
Voting right of debenture holders		227
Liability of trustees for debenture-holders		228

XV—*concl'd**Arbitration and compromise*

Court's sanction to proposed compromise or arrangement

Compromise between foreign and Indian companies

Acquisition of shares of dissentient shareholders

Winding-up of unregistered companies

Legal proceedings, offences, etc

Cognisance of offences

Inspection of company's books where no investigation is instituted

Penalty for certain offences to be specified in a schedule

Securities lodged by and provident funds of employees

False personation

Applicability of Act to banks, insurance companies, etc

The First Schedule—Table "A"

Additional compulsory regulations

Regulation 107 not to be retained as a compulsory regulation

Desirability of reducing formalities necessary for renewing defaced, lost or destroyed share certificates

Incorporation of compulsory regulations as sections of the Act

PART III

RECOMMENDATIONS RELATING TO THE FUTURE
ADMINISTRATIVE SET-UP

XVI—ADMINISTRATION OF THE INDIAN COMPANIES ACT

179—187

The present position

Administration of the present Act

Powers of legislation for joint stock companies under the constitution

<i>Chapter</i>	<i>Pages</i>	<i>Paras</i>
XVI— <i>contd</i>	.	.
Delegation of functions by Central to State Government		245
Reasons for the delegation		246
Additional duties entrusted to Registrars in States		247
Financial arrangements		248
Receipts and expenditure relating to administration of Indian Companies Act		249
Need for centralization of administration		250
Outlines of the scheme of administrative reform		251
.		
XVII —A SCHEME FOR A CENTRAL AUTHORITY	188—199	
<i>The case for a Central Authority</i>		
Need for a Central Authority		253
Justification for a Central organisation		254
<i>Some foreign precedents</i>		
Board of Trade functioning as central authority in U K		255
Functions of the Securities and Exchange Commission in U S A		256
<i>The structure of the proposed Central Authority</i>		
Type of organisation proposed		257
Corporate Investment and Administration Commission		258
Status and composition of the Commission		259
Functions of the Commission	.	260
Field organisation	.	261
Reports, returns, etc , to be submitted by the Central Commission	.	262

<i>Chapter</i>	<i>Pages</i>	<i>Paras.</i>
XVII—concl'd		
Cost of proposed Central Authority to be met by revising scale of fees, if necessary		263
XVIII—COMPANY STATISTICS	200—208	
Need for systematic compilation and analysis of company statistics		264
Nature of company statistics .		265
Importance of company statistics		266
<i>Official publications</i>		
Statistical publications relating to joint stock companies		267
Joint Stock Companies—(Monthly)		268
Joint Stock Companies in British India and certain Indian States (Annual)		269
Statistical Abstract India (Annual)		270
Monthly Abstract of Statistics .		271
Indian Trade Journal (Weekly)		272
Limitation of statistics relating to joint stock companies in India		273
Recommendations of the Inter-Departmental Committee on Official Statistics		274
Central Authority to examine question of statistics		275
XIX—CONCLUSION	209—211	
NOTE OF DISSENT ON SOME POINTS BY SHRI M L SHAH	213—221	
ANNEXURE	223—342	
ADDENDUM .	343—442	

APPENDICES--

Appendix I (List of witnesses)	445—449
II (Statistics relating to joint stock companies)	450—460
III (Committee's comments on the Indian Companies (Amendment) Ordinance, 1951)	461—466
IV (Note on the evolution of the accounts and audit provisions)	467—472
V (Note on the Securities and Exchange Commission, United States of America)	473—478

PART I

This Part deals with introductory and preliminary matters against the background of which we formulate our recommendations. Chapter I traces the circumstances in which the present enquiry was initiated and describes its progress. It also explains the structure of the Report. Chapter II attempts to elucidate the nature and scope of the present enquiry and the general attitude of the Committee towards the subject of company law reform. Chapter III traces the growth and development of company law in this country and the impact of some recent trends and practices in company management on the direction of our enquiry.

CHAPTER I

INTRODUCTORY

The Indian Companies Act, 1913, was extensively amended in 1936 by the Indian Companies (Amendment) Act of that year, but the need for a further revision of the Act was felt shortly after the end of World War II. Apart from the experience gained in the actual working of the Act which threw up many points necessitating its amendment, large changes had taken place in the organization and working of joint stock companies, and over a wide sector that was dominated by new elements in trade and industry, the character of company management had also materially altered. In many cases conventional methods of company management were discarded in favour of less orthodox and more venturesome techniques, which the existing company law was unable to control adequately. Further, at the end of the war, the Company Law Amendment Committee in the United Kingdom, more familiarly known as the Cohen Committee, presided over by Lord Justice Lionel Cohen, had submitted its report, after a laborious enquiry spread over two years. The report recommended several far-reaching changes in the English Companies Act, 1929, and since the Indian Companies Act has been always largely based on the prevailing English company law, Government considered that the time was ripe for a further review of the Indian Companies Act.

Need for revision of the Indian Companies Act

2 Accordingly, as a first step, the Government of India appointed in March 1946 Shri Tricumdas Dwarkadas, whom we have been fortunate to count as one of our colleagues, as an Officer on Special Duty to indicate fully the lines on which the Indian Companies Act should be revised not only in view of the amended provisions of the English Companies Act, but also in the light of the developments in the trade and industry of this country since 1936, and particularly during the war and post-war years. Between 1946 and 1947 Shri Dwarkadas submitted his recommendations in three parts, but was unable to complete his assignment on account of his other pre-occupations. The Government of India thereupon appointed Shri V K Thiruvenkatachari, now Advocate-General, Madras, to carry out some further studies in the matter and advise Government. Shri Thiruvenkatachari completed his task in October 1948.

Examination of the question by legal experts

3 The reports of Messrs Dwarkadas and Thiruvenkatachari formed the subject of a detailed departmental scrutiny in the old Ministry of Commerce. Shri N K Mazumdar, a former Registrar of Joint Stock Companies, West Bengal, was in charge of this work. The proposals formulated as a result of this departmental scrutiny were embodied in the "Memorandum on the Amendment of the Indian Companies Act" and circulated *inter alia* to all

Preparation and circulation of a memorandum of amendments

State Governments and organized industrial and commercial bodies in this country on the 1st December 1949. Unfortunately, the nature of the Memorandum was misunderstood, it being generally assumed that it recorded the tentative views of Government and was not merely a summary of certain proposals which had been departmentally considered and had been set out in the Memorandum mainly for the purpose of eliciting public opinion on them. In the result the Memorandum evoked widespread adverse comments and Government had to clarify the position about it in a statement in which they made it clear that it was their intention when they issued the Memorandum, to invite comments not only from trade and industrial organizations but also from Bar Councils, many other learned bodies and associations, the High Courts, the State Governments and the general public. These representations, which were received during a period of over six months in 1950, ran into many hundreds of pages of printed matter, and the analysis of this material was later on to constitute one of the first tasks of our Committee, after it had been set up.

Appoint-
ment of
Committee
and terms
of reference

4 The Committee was constituted by the Government of India Resolution No 23(71)-Law (CL)/48 dated the 28th October 1950, with the following terms of reference

“(1) Having due regard to the conditions necessary for the healthy growth of joint stock enterprises and the desirability of adequately safeguarding the interests of investors and the public, to consider and report what amendments are necessary in the Indian Companies Act, 1913, as amended by Act XXII of 1936 with particular reference to—

- (a) the formation of companies and the day-to-day conduct of their business,
- (b) the powers of the management *vis-a-vis* shareholders and the relations between them,
- (c) the safeguards required against abuse of such company practices as the interlocking of directorates, voting control by majority interests in company ownership and management, etc., which may be prejudicial to the public interest,
- (d) the measures necessary to promote efficient and economic management of companies

(2) To consider and report on any other matter incidental to the administration of the Indian Companies Act, in its bearing on the development of Indian trade and industry”

The composition of the Committee was as follows —

Shri C H Bhabha, Chairman

Members

(1) Mr Hussain Imam, M P

(2) Shri M Shankaraiya, M P

- (3) Shri Mohanlal L Shah
- (4) Mr A D Vickers
- (5) Shri J J Kapadia
- (6) Shri P N Vajpeyi
- (7) Shri V S Krishnaswami
- (8) Shri G P Kapadia
- (9) Shri Tricumdas Dwarkadas
- (10) Shri S M Basu
- (11) Shri S Ranganathan, ICS
- (12) Shri D L Mazumdar, ICS

Shri D L Mazumdar also acted as Secretary of the Committee

Mr Hussain Imam, however, did not take any part in the deliberations of the Committee after its meeting held in Delhi in September 1951, presumably because shortly afterwards he left India and migrated to Pakistan

5. As has been already said, one of the first tasks of the Committee was to study and analyse the extensive comments, which had been received on the proposals contained in the Government of India Memorandum. This work could be taken in hand only after the Member-Secretary was able to secure the minimum staff necessary to constitute the secretariat of the Committee by the middle of November. During the following six or seven weeks, the secretariat was continuously engaged in the analysis and tabulation of the available material. The results of this analysis were circulated to the members as they became ready, but the first preliminary meeting of the Committee could not be held till the middle of December 1950.

6. The programme and procedure to be followed by the Committee were settled at the second meeting of the Committee held in Delhi on the 14th January 1951. At this meeting, the Committee decided to appoint a Sub-Committee consisting of the following members to examine the provisions of the English Companies Act, 1948, and the Companies Acts of such other countries as might be considered desirable with a view to adapting them, where necessary, to the requirements of this country —

- (1) Shri C H Bhabha
- (2) Shri S M Basu
- (3) Shri J J Kapadia
- (4) Mr A D Vickers
- (5) Shri G P Kapadia
- (6) Shri M L Shah
- (7) Shri D L Mazumdar

The Sub-Committee was to submit its recommendations to the main Committee as soon as its deliberations were over

Examination
of witnesses

7 The Sub Committee held 30 sittings between January 1951 and September 1951, as detailed below, and went through the whole of the Indian Companies Act, 1913, and the corresponding provisions of the English Companies Act 1948 —

Madras—25th and 26th January 1951

Calcutta—12th to 14th March 1951

Bombay—10th, 11th, 14th to 18th and 21st May 1951

Bombay—21st to 28th June 1951

Calcutta—24th to 28th July and 1st August 1951

Delhi—13th, 14th and 16th September 1951

The Sub-Committee also considered the report of the Millin Commission in South Africa which had gone fully into the question of company law reform in that country and had in course of its enquiry considered the recommendations of the Cohen Committee in England and agreed with most of them. In addition to the regular meetings of the Sub-Committee some of our colleagues, notably Messrs A D Vickers, G P Kapadia and J J Kapadia, held many informal discussions on several aspects of our enquiry and prepared the preliminary version of many of the redrafts of different sections of the Act, which we have set out in the Addendum to the Annexure of our Report. This preliminary work considerably facilitated the Sub-Committee's task and helped it to take quick decisions on many controversial matters. We wish to record our appreciation of the time and thought that they devoted to the Sub-Committee's work and of their contribution to our work.

In between the meetings of the Sub-Committee, the main Committee held its sittings in Madras, Bangalore, Bombay, Calcutta and Delhi to examine witnesses on the following dates

Madras—27th to 29th January 1951

Bangalore—30th January 1951

Bombay—8th to 16th February 1951

Calcutta—15th to 21st March 1951

Delhi—26th to 29th April 1951

A large number of witnesses were examined, a full list of whom is given in Appendix I to this Report. In view of the opportunity which the representatives of trade and industry and the general public had already had of expressing their views on the subject, the Committee did not consider it necessary to issue a formal questionnaire, but in a communication addressed to the chambers of commerce and other trade and industrial associations, whose representatives were invited to appear before the Committee, our Member-Secretary informed them that in the evidence which they might lead before the Committee they need not confine themselves to the topics specifically mentioned in

the Commerce Ministry Memorandum, but would be free to extend their comments to any other aspect of company law or its administration which, in their view, required the consideration of the Committee. Later on, the Chairman of the Committee also invited the witnesses, after they had been examined, to forward to the Committee any additional notes or memoranda which they might like it to study and consider

8 The sittings of the main Committee interrupted the Sub-Committee's work and it was not till the beginning of August 1951 that the Sub-Committee could complete its task. Although the Sub-Committee was originally appointed primarily to undertake a comparative review of the provisions of the English Companies Act, 1948, and the Indian Companies Act, 1913, as its work progressed it was found that this review would not, by itself, facilitate the work of the main Committee, and it was necessary to examine the provisions of the two Acts more comprehensively. A complete review of the Indian Companies Act was, therefore, undertaken by the Sub-Committee on the clear understanding that its recommendations would be necessarily subject to further consideration by the main Committee. Besides, the Sub-Committee undertook the redrafting of several contentious sections, and the adaptation of some of the important sections in the English Companies Act, 1948. The final report of the Sub-Committee as it was circulated to the members of the main Committee consisted of three parts—Part I, an explanatory memorandum which explained the nature and scope of the main changes proposed by the Sub-Committee, Part II, a tabular statement showing the sections of the Indian Companies Act, which required amendment, including some new provisions, which the Sub-Committee wished to incorporate in the Act, and Part III, which contained the redrafts of some existing sections and drafts of some new sections proposed by the Sub-Committee.

Report of
the Sub-
Committee

9 The Sub-Committee's report was considered at the meeting of the main Committee held from the 14th to the 18th September 1951. The Committee generally approved of the recommendations of the Sub-Committee except in a small number of issues some of which were of major importance. The preparation of the final Report of the Committee took several weeks. Copies of the draft Report were circulated to the members at the end of November 1951 and the main Committee met again from the 4th January to the 11th January 1952 to consider the final draft. The Report was suitably revised in the light of the Committee's final recommendations and submitted to Government on the 29th February 1952.

Consideration of the
Sub Committee's
report

10 A few words are necessary to explain the lay-out and the structure of the Report. We have divided the Report into three Parts. Part I deals with introductory and preliminary matters, which are in the nature of a

Structure of
the Report

preface to our recommendations, and includes an elucidation of our approach to our enquiry (Chapter II), and a running commentary on the growth and development of company law in this country (Chapter III) Part II contains our substantive recommendations. In the arrangement of matter in this Part, we considered that the balance of advantage and convenience was slightly in favour of following the present lay-out of the Indian Companies Act, although a different lay-out based on the promotion, development, management and dissolution of companies would have been more logical. Accordingly, in the different chapters (Chapter IV to Chapter XV) in this Part, the topics discussed closely follow the order of the Indian Companies Act. We have not considered it necessary in the body of the Report to refer to all our detailed recommendations but have confined ourselves only to the more important of them. The Annexure to our Report contains these details, while the redrafts of certain sections of the Act and drafts of some new sections contained in the Addendum to the Annexure constitute an attempt at a larger measure of precision, in respect of our recommendations relating to some major provisions of the Act. These redrafts and drafts are intended only for the clarification of our ideas and intentions, and must be read along with the comments in the body of the Report on the appropriate sections. In particular, we should like to make it clear that they are not formal redrafts of the relevant sections, which must necessarily be the responsibility of the Parliamentary draftsman, but we trust that they will, in due course, assist the draftsman in his task. In Part III of our Report we have explained the present system of administration of the Indian Companies Act (Chapter XVI) and have set out our recommendation regarding the structure and functions of the Central Authority that we propose for the administration of the Act in future and for other connected purposes (Chapter XVII). We have also commented on the present stage of company statistics and emphasised the need for their reorganisation inasmuch as they have such a close bearing on the administration of company law (Chapter XVIII). In the last Chapter we plead for a comprehensive consolidating Bill (Chapter XIX).

Co-operation
by State
Governments
and trade
and industry

11 Before we pass on to the next Chapter, we wish to express our thanks to the State Governments and other authorities who arranged for our accommodation during our tours and to those Government departments at the Centre and in the States, which supplied us with facts and figures bearing on our enquiry. We also wish to record our deep appreciation of the ready response we received from the representatives of trade and industry, and of the other interests, who appeared before us during our enquiry and assisted us with their notes and memoranda. We can well imagine the time and thought which they must have devoted to this work, and we have greatly benefited by the views which they expressed and the opportunities that we

had of discussing our problems relating to this enquiry with them in course of their oral examination

12 We also desire to record our warm appreciation of the help we received from our Member-Secretary, Shri D L Mazumdar. Our enquiry involved the study and analysis of a mass of notes and memoranda which had been received in the old Ministry of Commerce on the Government proposals for the amendment of the Indian Companies Act and the oral examination of a large number of witnesses on these documents. The responsibility for the organization of this preliminary work fell on the shoulders of our Member-Secretary and we greatly appreciate his skill and thoroughness in the performance of this difficult task. He has rendered us great assistance also in the preparation of this Report and we have benefited greatly by his knowledge of the working of the trade and industry of this country and by the experience which he has acquired of organising large scale economic investigations on several commissions and committees, notably the Fiscal Commission and the Import Control Enquiry Committee.

Acknowledgement of services of the Member-Secretary and staff

The other officers of our Secretariat have also performed their duties in an efficient manner. In this connection we would particularly like to mention our Administrative Officer, Shri R. Gautam, who was in charge of the arrangements for our tours and meetings.

CHAPTER II

THE NATURE AND SCOPE OF THE ENQUIRY

13 As we mentioned in the previous Chapter, we consider it necessary to preface our Report with a short definition of our attitude towards the problem of company law reform. Some witnesses, who appeared before us, seemed to assume that our task necessarily pre-supposed that we should take a view of the role of private enterprise in the economic development of the country, in the light of such authoritative pronouncements on the objectives of economic policy as are set out, for example, in the Constitution of India or the Statement of Industrial Policy, 1948, and then formulate our recommendations in such a way that they may assist in the fulfilment of these objectives. Other witnesses suggested more explicitly that our recommendations should conform to particular economic policies, which in their opinion, "represented the avowed aims of the present Government" and "the welfare State",* while still others pleaded for the recognition of the importance of particular interests, e.g., labour in the administration of the Companies Act †

Approach
to the problem

*Vide memorandum submitted by the Hind Mazdoor Sabha
"Company Law partakes of the character of both Public Law and Private Law, of Substantive Law and Adjective Law. It regulates Commerce and Industry of the country and therefore vitally affects the Public interest. It imparts rights and imposes responsibilities on Private individuals and their associations and thereby operates and controls the economic system in the society like the heart in the human system. Its content will, however, differ with the character of the society, past or present, or the one to be shaped in the future."

In a Socialist Society where Nationalisation, Municipalisation and/or Co-operative functioning will be an order of the day, private enterprise will play a subordinate role. In a full-fledged Capitalist Society *laissez faire* becomes the dominant note. In a Capitalist Society, however, with the objective of Welfare State, according to the avowed aims of the present Government and the Ruling Party, State Control has to be exercised to check the evils of the vested interests and unbridled economic power in the interests of the general public represented by the vast bulk of the poor working and middle classes in the society. Keeping these limitations in mind, we submit below some constructive and most practical proposals for amending the Indian Companies Act, knowing fully well that they will meet with very stiff opposition from the small coterie of vested interests in our country."

†Vide memorandum submitted by the Indian National Trade Union Congress

"We find that the Government has taken into consideration the interests of the shareholders as well as of the consumers in preparing its memorandum. These notes however are intended to have the special reference to and emphasise the outlook of labour with reference to the Companies Act and its administration."

"We are of the opinion that labour is a partner in any business or industry in which it is employed. Though it does not contribute capital, it performs its function by contributing labour which is as essential an ingredient as capital in the production of goods or rendering of service. The partnership referred to by us is not one in the strict legal sense but in the sense mentioned above and it is from this point of view that we are making our observations."

14 For the reasons which we explain below we have not adopted any such *a priori* approach. In the first place, our terms of reference are specific and leave little scope for exploration in the fascinating field of economic objectives. Secondly, as we read the "Directive Principles of State Policy" in the Constitution, as enunciated in articles 36 to 51 of the Constitution, they seem to us to be primarily concerned with laying down a broad pattern of economic and social advance rather than any specific policies. As the Planning Commission observes—*

"Briefly, the Directive Principles visualize an economic and social order based on equality of opportunity, social justice, the right to work, the right to an adequate wage and a measure of social security for all citizens. They do not prescribe any rigid economic or social frame-work, but provide the guiding lines of State Policy."

The Industrial Policy Statement of 1948 is more germane to our enquiry, for in its explicit acceptance of a system of mixed economy, it provides the basic justification for the joint stock form of private enterprise. Apart from this, however, the statement in its affirmation of general principles relating to the different aspects of industrial development in this country, understandably gives little indication of the attitude of Government on the concrete problems of company law and company management with which we are concerned.

15 The truth is that company law is primarily concerned with means and not ends. It attempts to provide a legal frame-work for the corporate form of business management in which organisation, capital and labour are brought together in a particular form of relationship, which constitutes the essence of private enterprise. An enquiry into company law must, therefore, be necessarily based on a tacit acceptance of the fundamental postulates and assumptions of private enterprise. This does not imply that one must accept private enterprise as the mainspring of economic activity, much less approve of all that passes for private enterprise in this or other countries. All that it means is that one should recognise the limitations of an enquiry such as ours, which is concerned primarily with the mechanics of company management and not with the basic economic logic underlying it.

. The operation of private enterprise under modern conditions, must however, be subject to the acceptance of certain broad social objectives and of some recognised standards

*Vide The First Five Year Plan—A Draft Outline, p 11

of behaviour The Planning Commission, in its draft outline of the first five-year plan, stressed this point when it observed

“In a planned economy, private enterprise has to visualise for itself a new role and accept, in the large interest of the country, a new code of discipline. Private enterprise, like any other institution, will enjoy and justify itself only to the extent to which it proves to be an agent for promoting the public good.”

In our view, this new role of private enterprise is not, however, so much an incident of a planned economy as a consequence of the historical developments in the role of the State, irrespective of whether it has adopted a plan of economic development or not. The working of company law, in any country, must take note of this factor, which will become increasingly important in future. It is to this aspect of company law that paragraph (1) of our terms of reference apparently draws our attention when it enjoins on us to have due regard to the conditions necessary for the growth of joint stock enterprise and the desirability of adequately safeguarding the interests of investors and the public.

Objectives

16 In this view that we take of the task assigned to us we consider that company law is essentially a formal systematisation of the structure and mode of operation of a particular type of economic institution, and the complicated nexus of relationships which it has built up between the promoters, investors and the management is a by-product of the operation of private enterprise in what is usually called a “free” society. In the Chapters that follow, our object will be to consider to what extent it is possible to adjust the structure and methods of the corporate form of business management with a view to weaving an integrated pattern of relationships as between promoters, investors and the management, so that

- (a) the efficiency of the corporate form of organisation may be increased as measured by accepted standards,
- (b) managerial efficiency may be reconciled with the legitimate rights of investors,
- (c) the interests of creditors, labour and other partners in production and distribution may be duly safeguarded, and
- (d) the attainment of the ultimate ends of social policy is helped and not hindered by the manner in which the corporate form of business organisation works in this country.

17 It follows from this general approach that subject to what we have stated above, we consider the specific problems of economic policy as such, to be outside our purview, although we are free to admit that some of them, e.g., the problem of monopoly or the problem of the concentration of economic power, have a close bearing on our work. It is not, however, the province of company law to anticipate what economic policy should be, and we fully endorse the following observations of the Cohen Committee

Problems of economic policy and industrial management outside scope of enquiry

“We have regarded the question of general economic policy, which embraces such matters as monopolies as outside our terms of reference. The company law should, in our view, deal with companies irrespective of their particular activities, questions of economic policy should be dealt with by legislation directed to that subject, and kept distinct from the general law governing companies”

A further limitation to the scope of our enquiry arises from the fact that, although we are concerned with the efficient working of the corporate form of organisation, the problems of industrial management and industrial relations which closely affect it are outside our scope. This has an important bearing on paragraph (2) of our terms of reference, which asks us to consider and report on any other matter incidental to the administration of the Indian Companies Act, in its bearing on the development of Indian trade and industry. Structural and procedural improvements can only create conditions, the efficiency and vigorous working of private enterprise must primarily depend upon the initiative and drive of the management, the organisational and directing ability of managers and the other supervisory staff who are in day-to-day charge of a business undertaking, the technical efficiency of all grades of labour and last but not the least on sound and harmonious relations between labour and the management. No reform of company law can secure these desiderata and to that extent the contribution of a sound system of company law to the “efficient and economic management of companies or the development of Indian trade and industry” must be necessarily limited.

18 We have considered it necessary to elucidate at some length our general approach to our task and to indicate the limitations subject to which our enquiry has been carried on, because we are anxious to place our terms of reference in their proper perspective, and to discount in advance any undue expectations that may be entertained about the nature and scope of our recommendations. Nevertheless, we trust that there is nothing that we have said in the foregoing paragraphs that will be deemed to belittle the importance of a comprehensive enquiry into the company

Role of joint stock companies in economic development

law of this country The growth of joint stock enterprise in this country since 1936 has been so rapid and joint stock companies now cover so large an area of the industrial and commercial field in the private sector of the country's economy that the structure and mechanics of company management have become a subject of great practical importance What the *London Economist* observed in this context in its memorandum to the Cohen Committee applies with equal force to India

"The operations of companies now embrace by far the largest part of the economic life of the community that is *not* under direct Government control One of the most important ways in which Government can inform itself about the economic condition of the country is through the records provided by company finance, which are also indispensable as registering the effects of Government policy But it is not only because of its by-product of statistical information—important though that is—that company law impinges upon economic policy It is also clear that the execution of Government's economic policy must itself very largely operate through the medium of companies"

Shortness of time and inadequacy of data preclude us from attempting a statistical assessment of the role of joint stock companies in the economic development of this country That task must be left over for future research, possibly by the Central Authority which we propose, after it has re-organised company statistics and filled up to some extent the existing gaps in our statistical knowledge about the working of joint stock enterprise in this country In Appendix II to our Report, we merely set out some illustrative figures showing the growth and development of joint stock companies during the last few years We have also dealt with the subject of Company Statistics in Chapter XVIII

It follows from what we have stated in the foregoing paragraphs that, while company law cannot anticipate economic policy, much less be based on any *a priori* view as to the appropriate economic organisation of a country, it is very much its province to have the instruments of policy clearly set out A precise formulation of the concepts and categories in company law is necessary not only to define the relationships between the parties interested in the promotion, formation and management of a company, but also to subserve the ends of public policy Thus, if Government consider that it is in the public interest that joint stock companies should follow a particular line of policy, it should be possible to identify clearly these concepts and categories so that they can be used as instrumentalities of that policy To give only one example, it is now generally accepted that one potent method of controlling inflation is to regulate the volume and nature of investments but such

regulation must extend to investments by Government as well as by the general public, including companies. A little reflection will show, that if this regulation is to be fully effective, it will be essential to have the various categories of company finance clearly defined, so that significant movements in them may be capable of identification and kept under careful watch. Otherwise, it will be impossible for Government to prevent the diversion of company funds for purposes, which will not only thwart, but defeat national policy. In other words, to generalise from this illustration the mechanics of company formation and management must be rendered sufficiently fool-and knave-proof, not only for the benefit of those who are interested in a company but also as an aid to the attainment of approved economic objectives. It is from this point of view that we have approached our task.

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An important development in company law took place when the Government of India promulgated the Indian Companies (Amendment) Ordinance, 1951, on the 21st July 1951. In this Ordinance Government, for the first time, assumed extensive powers to intervene directly in the affairs of a company and also greatly extended the powers of the Court to take suitable action when the affairs of a company were being conducted in a manner prejudicial to its interests or in a manner oppressive to some part of its members. The Ordinance was replaced with some changes by Act LII of 1951, the Indian Companies (Amendment) Act, 1951. Before the Bill to replace the Ordinance was introduced in Parliament, the Government of India were good enough to consult us about the provisions contained in the latter. In order to consider this reference from Government, a special meeting of the main Committee was called in Calcutta where our Sub Committee was already in session. Our views on the Ordinance were communicated to Government in a letter from our Member-Secretary No 4(25)-CLEC/50-51, dated the 4th/6th August 1951, which we reproduce in Appendix III.

25 As we have pointed out in our introductory Chapter, the need for some further substantial amendments in the Indian companies was felt soon after the end of World War II. The sudden and hectic increase in industrial production in response to the growing tempo of war demands, brought in its train several malpractices in company formation and company management. The existing lacunae in the Indian Companies Act, 1913, and the defects in its administration enabled some businessmen and financiers, with no long and honourable traditions of service to the community, to misuse and sometimes to pervert the provisions of the company law to serve their private ends, while the absence of any adequate and effective organisation for the administration of the Act rendered remedial action through suitable administrative measures extremely difficult. As long as the war lasted, the expansive pull exerted by the war economy on domestic production masked these malpractices, but the end of the war brought them out to the surface and exposed them to the full view of an increasingly critical public, which had been already hit hard by the aftermath of the war, and was thereafter apt to ascribe most of its post-war ills to these undesirable practices in trade and industry*. A demand for early reform of the company law arose, and in current discussions on this subject, emphasis was laid particularly on the following aspects of company law

Need for
reform to
remove evils
manifesting
after World
War II

*Several authoritative reports, e.g., those of the Fiscal Commission, the Income-tax Investigation Commission, the Industrial Finance Corporation (Second Report) and the Planning Commission, to name only a few, have since drawn attention to many of these malpractices. In course of our enquiry, we brought the observations contained in these reports to the notice of our witnesses who generally acquiesced in them.

- (1) the manner in which companies were promoted and formed—with particular reference to the law about prospectuses, minimum subscription and allotment of shares,
- (ii) the nature and scope of the control exercised by shareholders on the management of a company,
- (iii) the powers and functions of directors and the control exercised by them over the companies and their managing agents,
- (iv) the terms of appointment and conditions of service of managing agents and their powers and functions *vis-a-vis* the directors of a company and the general body of shareholders,
- (v) the powers of investigation and inspection conferred on Government in cases of gross mismanagement of the affairs of a company,
- (vi) the manner in which company accounts were kept and audited,
- (vii) the position of minority shareholders and the protection to be accorded to them,
- (viii) the rights of shareholders and creditors in winding up,
- (ix) the administration of the Indian Companies Act, including the need for an authoritative body to keep a close and continuous watch on investment markets

The above list includes all the major topics set out in the Government Memorandum on the Amendment of the Indian Companies Act. A few other items included in it deal with minor issues with which we shall deal in course of our Report but to which no specific reference seems necessary at this stage.

Need for
Comprehen-
sive amend-
ment and
consolidated
legislation

26 We have kept these issues in the forefront of our enquiry and hope our recommendations deal with them adequately. We were glad to find that a large consensus of opinion among the witnesses, whom we examined, favoured a thorough amendment of the Indian Companies Act. It would be instructive to record that some witnesses, who in their written statements had opposed the comprehensive amendment of the Act, admitted in course of their oral examination that such piecemeal legislation would hardly serve its purpose and if the amendment of the Indian Companies Act was to be taken into hand, it was as well that it should be amended comprehensively. In fact, the need for a carefully drafted consolidated legislation was strongly emphasised by certain witnesses. In the next Part of our Report, we deal with the more important of our recommendations. We trust they will be found not only comprehensive but also in line with the historical development of company law in this country which we have traced in this Chapter.

PART II

In this Part, we explain and elucidate the more important of our recommendations, a complete list of which is set out in a tabular form in the Annexure to our Report. As we have pointed out in Chapter I, in the formulation of these recommendations we have preferred to follow the chapter arrangements in the Act of 1913 rather than a more logical order largely for reasons of practical and drafting convenience, but it will be for Government after they have considered our recommendations, to decide whether the draft of the appropriate Bill in future should follow the lay-out of the existing Act or a different arrangement of matter. We would add that in view of the detailed proposals contained in the Annexure, and the redrafts and drafts of some difficult and controversial sections which we have attempted, as an aid to the clarification of our intentions in some complicated issues, we have not considered it necessary to comment at much length on our recommendations. Our observations in this Part of the Report are, therefore, confined primarily to those recommendations which, in our view, raise important questions of policy or mark some significant departure from the basic ideas or principles underlying the provisions of the present Act.

CHAPTER IV

DEFINITIONS AND JURISDICTION

[Part I of the Indian Companies Act, 1913]

Definitions

27 As will be seen from the Annexure to this Report, (Pages 25 we have suggested several amendments to the *existing de-* 231 of ti finitions, the more important of which relate to the Annexure following —

- (i) debenture
- (ii) manager
- (iii) managing agent
- (iv) registrar
- (v) prospectus
- (vi) subsidiary and holding companies

(i) Under the existing definition, '*debenture*' includes '*debenture stock*'. A debenture means a document which either creates or acknowledges a debt. Ordinarily a debenture constitutes a charge on the undertaking of the company or some part of its property, but there may be debentures without any such charge and under the law, it is not necessary that the debentures should create a charge. We have, therefore, brought the definition of '*debenture*' in line with that contained in the English Companies Act, 1948, which defines '*debenture*' as including '*debenture stock, bond and other securities of a company whether constituting a charge on the assets of the company or not*' (ii) and (iii) The definitions of '*manager*' and '*managing agent*' gave us a good deal of anxiety, but in the end we agreed that the distinguishing characteristics of the former should be that he should be (a) an individual, (b) in charge of the whole or substantially the whole of the management of a company, (c) whether under a formal contract of service or not, and (d) serving under the administrative control and supervision of the directors. A managing agent, on the other hand, may be (a) a person, firm or a company, (b) in charge of the whole or substantially the whole of the management of a company, but (c) deriving his or its authority by virtue of an agreement with the company or by virtue of the memorandum or articles of association containing the terms of such agreement. Unlike a manager, who would be administratively under the control and supervision of the directors, the latter's control over a managing agent would be exercised only in terms of the agreement or the provisions of the Act. In this connection, we would refer to the new definition of '*managing director*' which we have recommended, and which fills a lacuna in the present Act. The distinction between a manager and a managing director, as we see it, is that whilst the latter derives his

**Managing
director**

Subsidiary
and holding
companies

power of management from an agreement with the company these powers need not necessarily extend to the whole or even substantially the whole of the company's affairs but may be and very often are restricted to one particular aspect of such affairs, unlike a managing agent the managing director must be an individual director of the company. In paragraph 146 of our Report we have recommended some special provisions about the appointment and terms of office of a manager and a managing director, which will further bring out the distinction between them and a managing agent (iv) The present definition of 'registrar' is unnecessarily restrictive We have accordingly widened its scope (v) In the definition of 'prospectus', we have included trade advertisements, which were in our view erroneously excluded by the Indian Companies (Amendment) Act, 1936 (vi) We have entirely recast the definitions of subsidiary and holding companies and replaced the existing definitions in section 2 of the Act by the provisions of section 154 of the English Companies Act, 1948 The effect of this new definition would be that company A would be deemed to be a subsidiary of company B, if one of the following conditions applies

- (i) company B is both a member of company A and controls the composition of the board of directors, or
- (ii) company B holds more than half of company A's equity share capital in nominal value, or
- (iii) company A is a subsidiary of any subsidiary of company B

As a corollary, a company is defined as a holding company of another, when that other company fulfils the above conditions so as to make it a subsidiary of the first It will be noted that a company under the new definition, may be the subsidiary of another even though it is not a company within the meaning of the Act

Certain additional terms defined (Pages 225-231 of the Annexure)

28 We also recommend that the following terms be defined in the future Indian Companies Act on the lines of our recommendations (*vide* pages 225—231 of the Annexure)

- (i) managing director
- (ii) associate of a managing agent
- (iii) Central Authority
- (iv) book and/or paper
- (v) documents
- (vi) Financial year
- (vii) issued generally
- (viii) body corporate
- (ix) branch office

(1) We have already commented on the definition of a 'managing director' (ii) The need for the definition of 'associate of a managing agent' arises from the fact that experience has shown that if the provisions of the Indian Companies Act relating to managing agents are to be adequately enforced, it is necessary to close the loophole, now provided by this category of persons. For, it is obvious that it is no use laying down restrictions on some particular activities of managing agents, if they can be legally carried on through the agency of their 'associates'. This closely follows the definition contained in the Indian Companies (Amendment) Act, 1951. (iii) Elsewhere in our Report, we elucidate our views on a central organisation for the administration of the Indian Companies Act. We have recommended that the powers and duties now conferred by the Act on the Central Government, as well as some new powers and duties that we have proposed, should be exercised and performed by a statutory central organisation in over-all control of the working of company law in this country. The definition of 'Central Authority' follows this recommendation. (iv) to (viii) The other additional definitions which we have suggested follow those in subsections (1) and (3) of section 455 of the English Companies Act and do not call for any comments, except the definition of 'financial year', where in view of our substantive recommendation as to the period during which the annual accounts of a company should be made up, we consider that the English definition should be appropriately modified. We suggest a definition of 'branch office', which would differ according to the nature of the company. In the case of a banking or insurance company, a branch would mean an establishment described as a branch by the company. In other cases, a branch office would mean an establishment where the same or substantially the same activity as that undertaken in the head office is carried on, and would not include the producing or manufacturing centres or places where they are situated at places other than the registered office of the company. We have thought it fit to give this definition because of the tendency noticed in some concerns treating even manufacturing centres as branches and because of the practical difficulty in determining as to what exactly a 'branch' means. Cases of manufacturing centres within a radius of say, 50 miles of the registered office were cited. It would be a curious process to treat these manufacturing centres having the entire activity as branches so that particularly no check would be exercised and only branch returns would be forthcoming.

29 We have left the definition of 'company' in the present Indian Act unaltered, but we consider it necessary to draw the attention of Government to the definition of this term in the company legislation of some other countries, where one of the legal requirements of a company is that one or more directors of the company should be persons of the nationality of the country in which the

Nationality
of directors
of companies

company is formed and registered. Thus, the General Corporation Law in the State of New York provides that—

“The business of a corporation shall be managed by its board of directors, all of whom shall be of full age and at least one of whom shall be a citizen of the United States and a resident of this State.”*

larly, Swiss legislation lays down that—

“the sole director of a company, and if there are more, the majority of directors must be of Swiss nationality and domicile. For holding companies, if the main purpose is investment outside Switzerland, Government may grant exemption from this requirement. Violation of the law may give cause for judicial dissolution.”**

We refrain from making any specific recommendation on this subject, as it is closely linked with the question of foreign capital, and Government policy towards foreign investments in general. We have not had any opportunity of discussing the implications of this policy with representatives of the Government of India who could speak with authority on this matter, and therefore, do not wish to make any definite recommendation, except to bring the issue to the notice of Government. If Government desire to amend the definition of ‘company’ on the lines of the New York State or the Swiss Law, they will no doubt also examine the alternative of suitably amending section 83A of the Indian Companies Act, which provides for the appointment of directors.

Position of
professional
advisers
(Page 231
of the Annexure)

30 In order to safeguard the position of professional advisers like solicitors, auditors and others, and to limit their liability, we consider it desirable to incorporate a sub-section similar to sub-section (2) of section 455 of the English Companies Act, 1948, with the proviso that this sub-section should apply except where the Act otherwise prescribes. This sub-section provides that a person shall not be deemed to be a person in accordance with whose direction or instructions the directors of a company are accustomed to act merely by reason of the fact that the directors of the company act on advice given by him in a professional capacity. Unless this immunity is given to professional advisers like solicitors and auditors, it will be difficult for them to carry on their professional work. In several sections of the Act (cf. our redraft of section 86D—item 11 of the Addendum to the Annexure) we have recommended that certain prohibitions or restrictions should be imposed on directors and managing agents and on those persons in accordance with whose directions or instructions they are accustomed to act, and that the penalties which

*Article 2, section 27, *vide* page 21 of McKinney's Consolidated Laws of New York—General Corporation Law, Book 22

**Cf. Swiss O. R. 711, quoted by A. Levy in *Private Corporations*, Vol. II, page 687

we have proposed for directors and managing agents who contravene the provisions of these sections should also extend to the latter category of persons. It is not our desire that professional advisers should come within these restrictive or penal provisions of the Act merely because they have tendered advice to directors and managers concerned and the latter have acted on such advice.

Jurisdiction of the Courts

31 The only important recommendation on the question of jurisdiction that we make is that certain types of suits and proceedings under the Companies Act should be triable exclusively in the High Courts. In Chapter XIII we have suggested that sections 164 and 165 of the Indian Companies Act should be so amended as to provide that winding-up proceedings in respect of companies with a subscribed share capital of rupees one lakh and over should take place only in the High Courts. We would further suggest that suits arising out of the new sections 153C and 153D, which we propose on the broad lines of section 210 of the English Companies Act, 1948, should also similarly be exclusively triable in the High Courts. The evidence that we received on this subject was, on balance, definitely in favour of the centralisation of jurisdiction in difficult and complicated matters arising out of the Indian Companies Act like those mentioned above. The only argument against this recommendation was the possible increase in costs to litigants in the districts, but from the testimony of well-informed witnesses who appeared before us, we gathered that even at present in all complicated cases of the type we have in mind, it was usual to obtain legal assistance at considerable cost, from the bars attached to the High Courts. We do not, therefore, think that the additional cost to litigants in the districts, that is likely to result from our recommendation, would be appreciable. In any case, the case for the centralisation of jurisdiction in the type of cases that we have in view is so strong that we do not hesitate to recommend this step.

(Pages 231 &
232 of the
Annexure)

There is one point arising out of our recommendations to which we would like to draw particular attention. While we have been unable to accept the suggestion in the Government Memorandum that the jurisdiction of District Courts should be widened and uniform powers should be conferred on them, and have recommended instead that certain types of cases under the Indian Companies Act will be triable exclusively by the High Courts, we would like to make it clear that our recommendations on this point are subject to administrative arrangements being made by the High Courts concerned to dispose of such suits and proceedings as expeditiously as possible. We were told by witnesses that congestion of work in some of the High Courts was considerable. If this is so, we suggest that company cases should receive priority and as far as possible should be allotted to a special judge in each High Court.

CHAPTER V

CONSTITUTION AND INCORPORATION OF COMPANIES

[Part II of the Indian Companies Act, 1913]

32 This Chapter is concerned with the mechanics of incorporation of joint stock companies. Our comments and recommendations are confined only to the following topics:

- (i) alteration of memorandum of association,
- (ii) form in which articles of association are to be registered,
- (iii) names of companies, and
- (iv) incorporation of associations not for profit

Alteration of memorandum of association

33 Sections 6 to 9 of the Indian Act contain the provisions relating to the memorandum of association of a company, while section 12 sets out the manner in which it can be altered. On the general subject of the conditions of a memorandum and particularly on the objects of a company, we received a good deal of evidence. Several witnesses complained to us that companies incorporated ostensibly for the purposes of manufacturing cotton textiles were engaged in the making of acids, chemicals, sugar, vegetable ghee, etc., while companies formed for the manufacture of sugar were manufacturing industrial solvents, photographic chemicals, etc., and argued that it was highly improper that the resources of companies should be thus invested in undertakings which had so little to do with the principal business for which they had been formed. Merely because many objects form part of a memorandum, there is no reason why the shareholders should be regarded as having acquiesced in authorising the directors to undertake activities which are completely removed from the main object of the company. While there was general agreement among us that it was neither in the interests of shareholders nor of creditors that companies should take all conceivable powers in their memorandum to transact this or that business, we found it difficult to devise a working formula under which restrictions could be imposed on their powers to do so, without introducing an element of rigidity into their constitution that might, on occasions, seriously prejudice their interest or impede their efficient working and the growth of industries. In this connection, we considered the practicability of distinguishing between the principal and the incidental and ancillary business of a company on the lines of sections 7 and 14 of the Canadian Companies Act, 1934*. While we fully appreciated that in theory a reasonably tenable case could be made out for this distinction, and in many cases it might provide a useful safeguard

* 24-25 George V, Chapter 33, as amended by 25-26 George V, Chapter 55

against the illegitimate extension of a company's activities, we were unable to find any practicable method by which this distinction could be generally enforced. Even if some practical method could be devised, we doubt very much whether it should be followed in the existing circumstances. The difficulty arises from the fact that, while in some cases it may be possible to distinguish between the principal and ancillary business of a company with sufficient precision to enable effective legal provisions to be made on the basis of this distinction, it is extremely difficult, if not impossible, to do so in all cases. Besides, even if it were possible to draw a sharp line between these two types of business, it may well be that, in many cases, the seemingly incidental or ancillary objects of a company are as important as its principal objects, and in that case there would be hardly any justification for treating the two objects differently.

The Cohen Committee in England approached the subject from a different point of view. It admitted that the existing prolixity in defining the objects of a company in its memorandum of association was neither in the interest of shareholders nor of creditors, and as memoranda of association were now drafted, the doctrine of *ultra vires* was an illusory protection for shareholders and a pitfall for third parties dealing with a company. But it took the view that the prevailing practice was largely a consequence of the rigidity of the then existing provisions of the English company law relating to the alteration of a memorandum, and, therefore, recommended considerable relaxation in these provisions and in particular suggested that companies should have as regards third parties the same powers as an individual. Its recommendations were, however, rejected by Parliament, as constituting too radical a departure from an established principle of the English company law and eventually, the modified provisions of the present section 5 of the English Companies Act, 1948, read with section 23 of the Act, were accepted as a fair compromise between divergent points of view.

In the circumstances of this country, we do not consider any such relaxation in the existing provisions of the Indian Act either necessary or desirable. Nor do we favour any intervention in this matter either by the Central Government or by the proposed Central Authority. Instead, we would rely on the responsible judgment of the management and the periodical vigilance of shareholders. Our specific recommendations relating to the powers of directors and managing agents to borrow and to lend and to purchase the shares of other companies will go far to restrain reckless investments. It is also our hope that the general result of our other recommendations may be to instil a greater sense of responsibility in directors and managing agents and to create a greater degree of alertness on the part of shareholders. If, however, our expectations in this regard are belied and the managements of companies continue to indulge in activities only very remotely connected with their

principal business, we recommend that Government should take stock of the situation and introduce such legislation as may be necessary to check the evil. For the present, we do not think that the evil is either so serious or widespread as to call for immediate action.

Articles of Association

Certain regulations to be adopted by all companies (Page 233 of the Annexure)

34 Sub-section (2) of section 17 of the Act contains a list of the regulations in Table 'A' which must be adopted by all companies incorporated under the Act. In paragraph 239 of our Report, we have commented on the regulations contained in Table 'A' and have recommended the deletion of some of them and the conversion of some others into compulsory regulations. We have further suggested that the compulsory regulations should be removed from Table 'A' and incorporated in the Act as substantive provisions. In view of this, we do not consider it necessary that the compulsory regulations should again be enumerated in sub-section (2) of section 17 of the Act. This sub-section should, therefore, be suitably amended.

Managing Agency agreement to form part of articles (Page 234 of the Annexure)

35 Having regard to the importance of managing agents in the working of joint stock companies in this country, we recommend that copies of managing agency agreements or where such agreements are still under consideration at the time of the preparation of the articles of a company, copies of the draft of such agreements should be printed and affixed to the articles of association before they are registered. When the agreement has been finally executed copies of the agreement should be attached to the articles of association and one copy should be filed with the Registrar of Joint Stock Companies. Our attention was drawn to the delays and difficulties in printing experienced in certain parts of India, particularly in the Calcutta area, but we do not think that these difficulties are such as to justify any amendment of section 19, which requires that the articles of a company must be printed.

Names of companies

(Page 233 of the Annexure)

36 Section 11 of the Indian Companies Act deals with the names of companies. As it now stands, it is hardly adequate for the purpose for which it is intended, and the list of prohibitions which was inserted in sub-section (3) by the Indian Companies (Amendment) Act, 1936, is far from complete. Instead of attempting the difficult task of compiling a complete list of undesirable names, we recommend that this section should be replaced by the provisions of sections 17 and 18 of the English Companies Act, 1948, suitably adapted for this country. The most important of the adaptations would be the substitution of the Central Authority for the Board of Trade, whose approval is required under the English Act for a change in the name of the company and which has the right to direct that no company shall be registered by a name which, in its opinion, is undesirable.

Associations not for profit

37 Section 26 of the Indian Companies Act, 1913, provides for the incorporation under this Act of associations formed not for profit, but for the promotion of commerce, art science, religion, charity or any other useful object. The powers of the Central Government in this regard are in practice exercised by the State Governments by delegation of authority to the latter, but it will be noticed that under section 289A of the Act, the powers of the Central Government in respect of non-trading companies with objects confined to a single State are the powers of the State Government concerned. It follows that as regards associations not for profit, whose objects are confined to a single State, the powers conferred on the Central Government under this section can be exercised only by the appropriate State Government. It was suggested to us that a sub-section might be added to this section authorising a State Government to exempt a company to which a licence had been issued under this section from filing returns relating to directors, although the names and occupations of directors might be required to be supplied. We commend this suggestion to Government.

Exemption of associations not for profit from filing certain returns (Page 235 of the Annexure)

38 There is another important proposal that we make under this section. Recent judicial decisions have thrown doubt on the point whether a firm as distinct from a company, can be a member of an association not for profit. * We are not unaware of the complications that might result from admission of firms into the membership of associations incorporated under section 26, but we consider that the balance of advantage is distinctly in favour of such admission. For, the usefulness of many associations not for profit is likely to be seriously undermined if important business houses are debarred from participating in the activities of such associations in their own right merely because they are firms and not companies. We, therefore, recommend that this section should be suitably amended to enable firms to be members of associations not for profit. We consider it necessary, however, that those associations should be required to provide in their articles that, on the dissolution of the partnerships, the memberships of these firms in these associations would also automatically lapse.

Eligibility of firms for membership of associations not for profit (Pages 235 & 236 of the Annexure)

Subject to the above proposals, we recommend that the entire section should be replaced by the provisions of section 19 of the English Companies Act, 1948, with the modification that the powers conferred on the Board of Trade under this section should be exercised by the proposed Central Authority.

* Judgment of the Oudh Chief Court dated the 4th September 1944 in Ganesh Das Ram Gopal *versus* R. G. Cotton Mills Co. Ltd. and another.

CHAPTER VI

SHARES AND SHARE CAPITAL

[Part III of the Indian Companies Act, 1913]

39 This Part of the Act of 1913 covers comparatively wide ground and deals mainly with the rights and obligations of holders of shares *vis-a-vis* the management of companies, when a company has been incorporated or when its capital structure is under re-organisation, and lays down the procedure for the adjustment of these rights and obligations. Our recommendations under this Part are fully set out in the Annexure of our Report. In this Chapter, we shall comment only on the more important of them which concern the following topics —

- (i) the register of members and the annual return,
- (ii) the transfer of shares,
- (iii) the policy to be followed in regard to share-warrants,
- (iv) classes of shares and the rights attaching to them,
- (v) alteration in share capital

Register of members and the annual return

Relationship
between
holding
company
and its sub-
sidiaries
(Page 237
of the
Annexure)

40 Section 30 of the present Act defines the members of a company. The original subscribers to a memorandum together with those who subsequently become members constitute a company from the date of its registration, but it is desirable to define more clearly the membership of a holding company than the Act at present does. We recommend that the provisions of section 27 of the English Companies Act, 1948, be adopted. Under this section of the English Act, no subsidiary or its nominee can in future become a member of its holding company, except as a personal representative or a trustee. In the latter case, neither the holding company nor the subsidiary may have any beneficial interest under the trust except by way of security for the purpose of a transaction entered into in the ordinary course of a business, which includes the lending of money. In regard to subsidiaries, which are already members of their holding companies, they are permitted to retain their membership but can exercise no voting rights in future, except where they are personal representatives or trustees. Further, any allotment or transfer of shares in a company to its subsidiary is declared to be void. These salutary provisions constitute an attempt to maintain the separate operational identity of a holding company and its subsidiary and thereby to preserve the respective shareholders' control over them. In the absence of any such provision, the affairs of a holding company and its subsidiary may, in the hands of unscrupulous company managers, become inextricably involved and confused to the serious detriment of shareholders.

11 We attach much importance to the fullest disclosure of all relevant information in the register of members and the annual return, to the maintenance of the register up to date to the submission of the annual return within the prescribed date with all necessary entries, and to adequate facilities for the inspection of the register and the annual return. From this point of view, we suggest that section 32 of the Act should be revised on the lines of section 124 read with section 126 of the English Companies Act, 1948, subject to the following modifications. The annual return form, 'Form E', should be brought in line with the provisions of Schedule VI of the English Companies Act, which provides *inter alia* that the annual return should also contain a list of registered debenture holders and information about their occupations and the occupation of other directors. Sub-section (3) of section 32 of the Indian Companies Act requires the annual return and summary to be completed within 21 days of the first or ordinary annual general meeting of the year. Section 126 of the English Act extends the period to 42 days. We suggest that this period should be a month from the date of the holding of the annual general meeting.

Full disclosure of information in register of members and annual return (Pages 237 and 238 of the Annexure)

Similarly, a slightly different form of annual return should be submitted by companies not having a share capital, on the lines of the provisions contained in section 125 of the English Act. We further suggest that the annual return should be submitted to the Registrar of Joint Stock Companies within one month of the holding of the annual general meeting of a company. In order that bonus shares might be brought clearly under section 104 (1) (a) of the Indian Companies Act and might not be construed to fall under section 104 (1) (b), we suggest that a separate heading for bonus shares should be inserted under sub-section (2) of section 32 of the Indian Act. We also suggest that section 125 of the English Companies Act which provides for the submission of the annual return by a company, not having a share capital, should be incorporated as a separate sub-section in this section.

Transfer of shares

42 Under the scheme of the Indian Act, as in the English Companies Act, 1948, the right to refuse to register the transfer of shares belongs to the directors in terms of the articles of the company concerned. If the articles do not contain any such power on the part of the directors, the registration of the transfer cannot be refused, unless there is any breach of any of the provisions of section 34 of the Act, relating to the transfer. We understand that the legal position is that when the directors refuse to register an otherwise valid transfer of shares, the presumption is that

Directors' right to refuse transfer of shares (Page 238 of the Annexure)

transfer, the Court is entitled to go into the reason and to arrive at a finding on it. It is partly because of this fact and partly because of the present law of libel that the directors generally refuse to give any reason for their action when they decline to register a transfer of share

Powers to
refuse trans-
fer to remain
with direc-
tors subject
to right of
appeal of
transferor or
transferee
(Page 238
of the
Annexure)

43 Several witnesses and shareholders' representatives generally pressed for a provision in the Act that fully paid-up shares should be freely transferable and that the directors of a company should not have the power to refuse to register transfer in such cases. It was contended that the power now conferred on the directors by the articles was often abused, and the restriction on transferability affected the negotiability of shares and was, therefore, detrimental to the interest of investors. We are aware that in some cases the right to refuse to register transfers has been misused by the directors, and that the argument about the negotiability of shares is not without force. We would also add that the London Stock Exchange and the leading stock exchanges in India e.g., those of Calcutta, Bombay and Madras, do not usually grant quotation to securities if directors have the power to refuse the transfer of fully paid-up shares. Several companies have accepted this requirement. This suggests that in the case of quoted securities, at any rate, the argument in favour of retaining directors' powers to refuse transfer of fully paid-up shares is not strong. Nevertheless, we take the view that, all things considered, it will not be generally in the interest of the companies to deprive the directors of their present right, provided that the articles of the company confer this right on them. While the possibility of abuse of this privilege remains, we can visualise circumstances in which this right may be legitimately exercised in the interest of a company. In order, however, to reduce the possibility of arbitrary action on the part of directors to a minimum, we suggest that while they should be free to exercise the powers conferred on them by the articles, it should be open to the transferor or transferee of a fully paid-up share in a public company to prefer an appeal against the order of the directors to the proposed Central Authority. We would, however, suggest that hearings on this appeal before this Authority should be conducted confidentially, so that the law of libel may not apply to them, and that the Authority should be under no obligation to disclose communications with the parties concerned or to give reasons for its decisions.

Definition of
'scrips"
(Page 239
of the
Annexure)

44 We have two minor recommendations to make under sub-section (3) of section 34 of the Act. This sub-section requires that all applications for transfer of shares or debentures must be accompanied by duly stamped and executed instruments of transfer along with the "scrips" concerned. Practical difficulty has been encountered by the present requirement about the production of "scrips", inasmuch as they are not always available to the members of a company till several days have elapsed after the issue

of the letters of allotment We, therefore, suggest that the word "scrip" in this sub-section should be so defined as to include allotment letters

45 In paragraph 139 of its report, the Cohen Committee referred to a practical difficulty caused by the indivisibility of share certificates, and recommended that the law as to the "certification of shares" should be clarified and placed beyond the reach of conflicting judicial decisions Section 79 of the English Companies Act, 1948, carries out this recommendation We suggest that a similar section be adopted also in the Indian Act

Certification
of shares
(Page 239
of the
Annexure)

Share-warrants

46 Sections 43 to 48 of the Indian Companies Act deal with "share-warrants" We are not unaware of the ill-deserved cover which share-warrants may provide for those who carry on anti-social activities, but we do not think that much use is made of these provisions in this country We do not, therefore, consider it necessary to repeal these sections The objects of public policy can, in our view, be adequately achieved by a stipulation to the effect that no such shares should be issued unless (a) there is a provision in the articles of the company for such issues and (b) the prior approval of the Central Authority has been obtained

(Pages 240
241 of the
Annexure)

Classes of shares

47 The Indian Companies Act, 1913, makes no specific provision about the classes of shares, which a company can issue, or the rights attaching to shares of different classes It would be convenient if we discussed this subject at this stage Some witnesses appearing before us commented adversely on three practices—(a) the conferment of voting rights on preference shareholders in the same way and on the same terms as for ordinary shareholders, (b) the absolute denial of voting rights to preference shareholders and (c) the more recent practice of issuing deferred shares with disproportionate voting rights which grew up rapidly since the outbreak of World War II We were given to understand that these practices were prevalent more or less all over India We do not consider it necessary to go into the motives underlying these practices but the only argument in favour of the practice of conferring disproportionate voting rights on deferred shares is that they provide an incentive for the investment of capital into certain types of enterprises, generally of a risky and speculative nature—which would not otherwise be attracted to them The his-

Present
voting rights
attached to
different
classes of
shares

disproportionate voting rights has often resulted in the control of an undertaking by a minority of shareholders, and by the undesirable repercussions which they produce on investment markets more often than not impede capital formation. Indeed, in our view, deferred shares with disproportionate voting rights have, as a rule, little to commend themselves, and except in very rare cases are merely a legal device for securing control over an undertaking, with a comparatively small holding of share capital.

As regards preference shares it is not now common to find absolute voting rights being granted to this class of capital. As the learned editor of Palmer's Company Precedents observes—

“Formerly it was not usual to distinguish between the preference shares and the ordinary shares as regards voting. They were all treated as interested alike in the company and given the same right of voting, but for many years past, it has been customary to give only qualified voting rights to preference shares. The matter is one of great importance, for if preference shares have full voting rights they may be able to direct the proceedings of the company in a manner opposed to the interests of the ordinary shareholders, they may be in a position, for instance, to elect directors and to control their proceedings, and to restrict the development of the business, and they may unduly exercise their powers in their own favour, and in a selfish spirit, for the interests of the two classes are very commonly more or less in conflict, the interest of the preference shareholders being to preserve the business on a safe basis sufficient to produce their preference dividend, whereas the interest of the ordinary shareholders is to increase it, and for that purpose to incur some risks, if necessary.”*

Future
classification
of shares
and rights to
be attached
to each class
(Pages 241-
44 of the
Annexure
and para 52
of the
Report)

48 Our recommendations on this subject are broadly as follows —

- (1) the capital of a company should, as regards issues made after the date of the publication of the Report, be divided into two broad categories namely, equity capital and preference capital. We have already defined equity capital in our redraft of section 105C (*vide* item 21 of the Addendum to the Annexure of our Report). We suggest that all share capital of a company other than equity capital should be deemed to be preference capital,

(ii) preference shares should, in future, have only qualified voting rights, *i.e.*, in the following contingencies —

(a) during such period as the preference share dividend or any part thereof remains in arrears and unpaid, such period starting from a day not more than a year or such lesser period, as the articles might provide, after the due date of the dividend, and

(b) in regard to any resolution passed, which directly affects any of the rights attached to such shares or the interests of the holders thereof including any resolution for the winding-up or reduction of capital of the company

In the case of non-cumulative preference shares the voting rights of holders of such shares should be exactly on the lines of those given to cumulative preference shareholders, subject, however, to the exception that non-cumulative preference shareholders shall not be entitled to vote unless their dividends have remained unpaid for a successive period of two years. Such voting rights shall be exercisable only when payment has not been made for two successive years,

(iii) voting rights in the case of all shares—equity as well as preference, when such rights become operative in the case of preference shares—should be strictly in proportion to the capital paid or credited as paid up thereon,

(iv) no class of shares other than a preference share carrying a fixed dividend should be issued, which confers any rights as to dividend, capital or voting power of the company, disproportionate to the rights attaching to the ordinary shares without the prior consent of the Central Authority,

(v) as regards existing companies which have issued any shares, by whatever name called, conferring on the holders thereof voting rights more favourable than those which we propose should be conferred in future on the holders of equity capital, it should be provided in the Act that the companies must, within a period of three years from the passing of the Act, bring the voting rights in respect of such shares in proportion to the amount of capital paid up or credited as paid up thereon

Provided, however, that during this interim period such disproportionate voting rights should not be exercised on any resolution relating to the appointment or reappointment of a managing agent or any variation in the managing agency agreement, the appointment of buying or selling agents, the grant of loans to any company under the same management as that of the managing agent of the company or the managing agent's associates. On resolutions relating to these matters, the voting rights should be strictly in proportion to the capital paid up on such shares,

(vi) the Central Authority should, however, have the power to exempt any company from the requirement of the last preceding clause if it thinks that there are special reasons for doing so, but we would add that we do not recommend the grant of the exemption suggested above to any company which has issued shares with disproportionate voting, dividend or other rights after the 1st December 1949, when the Government of India's Memorandum on the Amendment of the Indian Companies Act was made known to the public,

(vii) existing dividend or other rights attaching to any shares should not be affected by the Act

Power of
Central
authority to
relax the
general rules
in special
cases
(Pages 241-
44 of the
Annexure)

49 We consider that the above recommendations will adequately safeguard the interests of both preference and ordinary shareholders, so far as voting rights are concerned. At the same time, flexibility is ensured by the authority proposed to be conferred on the Central Authority. This will meet the requirements of those special cases where it is obviously in the interest of the company as a whole that the general rules laid down above should be relaxed, but shareholders will be able to rest assured that directors will not be able to issue shares with disproportionate voting or other rights, unless the issue has been considered and approved by an independent body on the merits of the case.

Our above recommendations apply only to public companies, although private companies which are converted into public companies or are subsidiaries of public companies would automatically come within their purview.

There is one small point to which we would refer in this context. We recommend that when calls are made they must be made on a uniform basis for the amount so called on each share in any particular class.

Alteration in share capital

Provision of
funds for

50 Sections 50 to 53 of the Indian Companies Act, 1913, deal with increases in the share capital of a company,

while sections 54A to 65 deal with restriction on purchase of its own shares by the company and with reductions in its capital. The only important recommendation that we make is that the prohibition imposed by section 54A of the Indian Companies Act should not apply to the provision of funds by a company for the purchase of, or subscription for, fully paid-up shares by a trustee or trustees for the benefit of employees of the company or to grant of loan by the company to its employees for a similar purpose. We, however, suggest that such payment should be subject to the limit of three months' salary of the employees concerned. The object of our recommendation is to enable the purchase of its shares by a company on behalf of and for the benefit of its employees or by the employees themselves up to a limited extent. Section 54 of the English Companies Act, 1948, imposes no such limit on the purchase of a company's shares, but in the circumstances of this country, we have considered it desirable to limit the purchases to three months' salary of the employees. We trust that this provision, if wisely and tactfully implemented, will enable the employees to have a reasonable stake in the affairs of a company and promote the improvement of industrial relations. At the same time, the operation of this provision will have to be carefully watched, in the initial stages, so that the opportunity that it offers to a company for the investment of its funds in its own shares is not abused to the prejudice of the employees. It should be one of the functions of the proposed Central Authority to watch developments of this type, and to suggest appropriate action to Government, if and when circumstances call for such action.

purchase of
shares for
benefit of
employees
and loans to
employees
(Page 244
of the
Annexure)

51 There is another matter relating to the reduction of the share capital of a company to which we would like to draw attention. Sections 58 and 59 of the Indian Companies Act, 1913, require that where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, the Court shall settle the list of creditors entitled to object to the reduction and adjudicate on their claims to object before it passes any order confirming the reduction. It is not open to the Court to dispense with this elaborate procedure, even if it is satisfied that no such adjudication is necessary. We recommend that this apparent limitation on the power of the Court should be removed by the incorporation in section 59 of a sub-section similar to sub-section (3) of section 67 of the English Companies Act, 1948. This sub-section enables the Court to dispense with the formalities relating to the settlement of creditors' objections, where it is satisfied that the scheme of reduction would not jeopardise their interest. This would be particularly useful where life insurance offices desire to reduce their capital, as, under the existing law, Courts have no power, even in fit cases, to dispense with notice to policy holders who are considered to be creditors of such companies.

Power of
Court to
dispense
with
formalities
relating to
settlement
of creditors'
objections to
reduction of
capital
(Page 245
of the
Annexure)

Further issue
of Capital
(Page 301
of the
Annexure
and page 399
of the
Addendum)

52 Before we pass on to the next Chapter we would say a few words to explain our redraft of section 105C of the Act of 1913 (*vide* item 21 of the Addendum to the Annexure of our Report) which has been a prolific source of trouble since its insertion by the Indian Companies (Amendment) Act, 1936. In order to resolve conflicting judicial decisions* and to clarify the intentions of the legislature, as we understand them, we propose that this section should be concerned with all increases in the subscribed capital of a company after the first allotment has been made. Our recommendations on this point are as follows —

- (i) that the additional capital should be offered to the holders of equity capital in the company in proportion to their holdings of paid-up capital unless the company in general meeting sanctioning the issue decides to the contrary,
- (ii) that a holder of equity capital to whom this offer is made should have the right to renounce the whole or part of this offer in favour of a third party unless the articles otherwise provide,
- (iii) that the directors should have the power to dispose of the new shares in a manner beneficial to the company, when the holders of the equity capital to whom the additional shares are offered decline to accept them, or when in the opinion of the directors and by reason of the ratio which the new shares bear to existing capital, any of the new shares cannot be conveniently offered to the holders of equity capital, and
- (iv) that subject as above, nothing in a company's memorandum or articles of association or in any agreement with a third party should authorise the directors to dispose of the new shares otherwise

Under the existing section, when it applies, new shares have to be offered to all shareholders irrespective of class. We consider it obviously unfair that holders of preference shares should automatically obtain privileges where further capital is to be issued, and our recommendation restricts the right of taking up further shares to the holders of the equity capital in the company, as defined by us in our redraft of section 105C (item 21 of the Addendum) unless the company in general meeting sanctioning the issue decides to the contrary.

* *Vide Nanalal Zaver vs Bombay Life Assurance Co* (1950) on appeal from 1949 B 56, 50 Bombay L R 413

CHAPTER VII

PROSPECTUS MINIMUM SUBSCRIPTION AND ALLOTMENT OF SHARES

[Part IV of the Indian Companies Act, 1913, sections 92—105B and sections 106—108]

53 In this Chapter, we propose to deal with the provisions of the Act of 1913 relating to prospectuses, allotment of shares and minimum subscription. The evidence tendered before us on these subjects was conspicuous by its unanimity, and we found, in course of the examination of witnesses an agreeable readiness on their part to fall in with most of the suggestions which we now present as our recommendations in this Chapter. Recent developments in company law have emphasised the importance of the fullest possible disclosure in prospectuses or statements in lieu of them, and in the balance sheets and profit and loss accounts of companies. For it is now increasingly recognised that full disclosure of the facts and circumstances relating to the formation of a company and the manner in which it is worked as reflected in its accounts, constitutes the best safeguard against abuse of the processes of the law by unscrupulous company promoters and managers.

54 In the proposals that we make in this Chapter, we have tried to adapt the provisions of the English Companies Act, 1948, and the recommendations of the Millin Commission in South Africa to the conditions of this country, but we would point out that in several material particulars, our recommendations go much beyond the English Act or the recommendations contained in the Millin report. Section 38 and the Fourth Schedule of the English Act lay down the requirements as to disclosure in a prospectus, while section 48 and the Fifth Schedule provide for similar disclosure in a statement in lieu of prospectus. Section 93 of the Indian Act of 1913 sets out at length the matters which have to be brought out in a prospectus, while section 98 read with Form I in the Second Schedule to this Act sets out the particulars which must be included in a statement in lieu of a prospectus. As will be seen from the Addendum to the Annexure of our Report, we have attempted a redraft of these and connected sections more or less on the lines of sections 38 to 46 of the English Companies Act, read with the Fourth Schedule of this Act, appropriately modified by the recommendations of the Millin Commission in South Africa. Similarly, in regard to the provisions about allotment of shares, our recommendations are based on sections 47 to 52 of the English Companies Act, while our recommendations as to minimum subscription follow very closely the provisions in clause (4) of the Fourth Schedule of that Act. It will be

Full disclosure in prospectus and balance sheet and accounts

Relative provisions in United Kingdom and South Africa (Pages 295-8 of the Annexure and pages 375-98 of the Addendum)

seen from the form in which our redrafts of the relevant sections of the Act of 1913 have been cast, that we have followed the arrangement of matter in the English Companies Act, 1948, relating to these sections, and have transferred to a schedule the particulars to be disclosed in a prospectus, which are now enumerated in section 93 of the Indian Act. We think this is an improvement on the existing arrangement, inasmuch as the relegation of a mass of details to a schedule will focus attention on the provisions of the substantive sections, and thereby help in the better appreciation of the inter-relations between them.

Prospectus

Contents of
prospectus
(Pages 375
76 of the
Addendum)

55 Our principal recommendation concerns the particulars that should be included in a prospectus. We recommend a considerable enlargement in the requirements under this head as laid down in section 93. Our proposals are contained in the schedule which forms part of item 20 of the Addendum. In the following sub-paragraphs we comment on the more important of them. The references to the clauses below are to those in this schedule.

Memorandum of
association
(Page 390
of the
Addendum)

(1) *Clause 1*—This clause refers to section 93(1)(a) which, among other things, requires disclosure of the contents of the memorandum of association. While it does not suggest any change to the existing clause, it is necessary to mention that under the Fourth Schedule to the English Act, 1948, this disclosure has been done away with on the ground that the business of the company would be invariably disclosed in the prospectus. We have, however, retained with a slight amendment the present provision with regard to disclosure of contents of the memorandum as many provisions, besides those relating to the company's business, are generally inserted in the memorandum. It would, therefore, not be advisable to deprive the intending subscribers of the knowledge of these provisions. Our proposal is also in keeping with our earlier recommendation where, differing from the English Act, we have retained the existing provisions about obtaining the Court's sanction to alteration in the memorandum.

Names,
occupation
of managing
agents
managers,
etc
(Page 390
of the
Addendum)

(2) *Clause 3*—This clause amends section 93(1)(c) by bringing managing directors within the scope of the section and extending the information required about remuneration and compensation for loss of office.

Capital of
the managing
agency company
(Page 390
of the
Addendum)

(3) *Clause 4*—This is a new requirement. It seeks to require information about the capital of the managing agency company, as cases have come to light where such capital has been found to be highly inadequate as compared with that of the managed company and the stake involved therein. While we do not consider it practicable to

formulate a hard and fast rule about the proportion which the subscribed capital of the managing agency company should bear to that of the managed company, we feel that intending subscribers are entitled to information from which they may be able to form a judgment about the financial standing of the managing agency company

(4) *Clause 5*—This clause deals with minimum subscription. The relevant provisions are contained in section 101 and are combined with those relating to restriction on allotment. We have separated those provisions from the above section and have included them in the schedule which is their appropriate place. We have suggested that the requirements in respect of each head mentioned in sub-clause (a) of this clause should be separately stated as under the English Fourth Schedule, and that such requirements should be stated after due enquiry by the directors. We also recommend that an additional heading be inserted covering all expenditure other than such as is to be specifically indicated. The present Act permits the mention of an omnibus figure to cover all the four items mentioned in sub-clause (a) of clause 5 of our Schedule. This is unsatisfactory and has led to widespread abuse in the form of grossly under-capitalised floatations. The ease with which mushroom companies have been floated albeit with the approval of the Controller of Capital Issues in many cases, points to the necessity of imposing some obligation on directors for making due enquiry before estimating the capital requirements of the concerns. Taking advantage of the present unsatisfactory position, promoters have succeeded in obtaining certificates to commence business with what little capital they have been able to collect. In the result, concerns have failed to make any headway and the interests of the investing public have suffered.

Minimum
subscription
(Page 390
of the
Addendum).

(5) *Clause 6*—This clause provides for information about the time for the opening of the subscription list. This is a new requirement and is consequential upon the proposed new section 101(1) in the Addendum which is referred to later on.

Opening of
subscription
list
(Page 391
of the
Addendum).

(6) *Clause 8*—This clause requires disclosure of the substance of any contract or arrangement or proposed contract or arrangement whereby any option or preferential right of any kind has been or is proposed to be given to any person to subscribe for any shares or debentures in a company and other incidental matters. This is a new requirement, and should prove useful especially in those cases where it is customary to allot shares or debentures to some particular interests, e.g., machinery manufacturers or technicians for services rendered or to be rendered or where shares are allotted to a broker with a view to his offering them for sale to the public.

Options and
preferential
rights
regarding
issue of
shares
(Page 391
of the
Addendum).

(7) *Clause 10*—This clause provides for disclosure of the amount of premium if any, payable on each share and where some shares are to be issued at a premium and others of the same class at par or at a lower premium, of the reasons

Issue of
certain
shares at
a premium.

(Page 392
of the
Addendum)

for the differentiation. This is a new requirement and is intended to meet those cases where shares are issued at a premium to the general body of intending subscribers and at par or at a lower premium to promoters. While we do not advocate complete prohibition of the practice, we consider that intending subscribers are entitled to know the reasons for such differentiation.

Under
writing
(Page 392
of the
Addendum)

(8) *Clause 11*—This clause refers to disclosure of underwriting arrangements. Although no change is proposed in the existing section 93(1)(ee), we desire to state that instances of defaulting underwriters were brought to our notice and we were urged to recommend the tightening up of the present provisions on the lines of the recommendations contained in the Millin Commission report, under which the underwriter has to file a declaration as to his ability to carry out his obligation and in the event of the declaration proving false, he is liable to be prosecuted. Under existing conditions in this country, we are not inclined to resort to such drastic remedy. In our opinion, the recommendations made by us in regard to investigation of the affairs of a company should be enough to meet the situation as it would be competent for the Central Authority in appropriate cases to take necessary action for recovery of the amount lost in consequence of the failure to carry out any underwriting agreement.

Property to
be purchased
and vendors
thereof
(Pages 392
and 393
of the
Addendum)

(9) *Clause 12*—This clause requires disclosure of information concerning the property to be purchased by the company issuing the prospectus and the vendor thereof. The existing provisions are contained in sections 93(1)(f) and 93(1)(ff). Our proposals seek to follow clause (9) of the Fourth Schedule to the English Act, 1948, with certain additions. It would not be out of place to mention that the most material change made by the English Schedule refers to disclosure of prior transactions in respect of the property that may have taken place during the preceding two years. This is already provided for by section 93(1)(ff). Certain exceptions in this respect made by the English Schedule have, however, been adopted by us as they appear to be reasonable. As regards the additions proposed by us, we invite attention to sub-clause (c) of clause (12) under which the nature of the title or interest in the property is to be disclosed. This has become necessary in view of certain instances brought to our notice where prospectuses have been issued for acquiring properties bearing defective titles. This has created difficulties and involved litigation seriously affecting the interests of the companies concerned and the subscribers and their share capital. We also invite attention to sub-clause (d) of clause (1) under which in addition to short particulars of relevant transactions completed within the two preceding years, information has been required as to the dates of such transactions, the names of the interested directors or promoters and the amounts payable.

(10) *Clause 13*—This clause seeks to amend the existing section 93(1)(h) by including within its scope commission paid or payable to sub-under writers who may be the promoters or the officers of the company. This information is excluded at present and we do not see any reason for its exclusion.

Sub under-
writers'
commission
(Page 393
of the
Addendum)

(11) *Clause 14*—This clause seeks to amend section 93(1) (i) by requiring information as to the persons by whom preliminary expenses are paid or payable. In view of many different kinds of arrangements that are frequently made with regard to payment of preliminary expenses, this information is necessary. Information is also called for as regards the expenses of the issue which need not at present be disclosed.

Preliminary
expenses
(Page 393
of the
Addendum)

(12) *Clause 16*—Under this clause information is required to be given as to the general nature of every material contract. This recommendation follows paragraph 14 of the English Schedule and is an improvement on the present position as envisaged by section 93(1) (l). The intention underlying the recommendation is to provide for intending investors some means of judging from the prospectus itself which contracts are of importance.

General
nature of
material
contracts
(Page 393
of the
Addendum)

(13) *Clause 18*—This clause seeks to amend the existing section 93(1)(n) by widening its scope so as to require information as to the interest of the promoter in addition to the interest of the directors. It also requires disclosure of the interest of these persons in the property purchased within two years preceding the date of the prospectus. The obligation to disclose such interest has also been extended to companies in which the director or promoter may be a member.

Interest of
directors
and
promoters
(Page 393
of the
Addendum)

(14) *Clause 22*—This clause provides for disclosure of particulars of capitalisation of reserves or profits of the company and its subsidiaries as also of the surplus arising from revaluation of the assets of the company and its subsidiaries during the two years preceding the prospectus and the manner in which such surplus has been dealt with. This is a new requirement and is justified by the widespread practice of capitalising reserves and the increasing tendency to revalue assets.

Capitalisa-
tion of
reserves and
profits and
revaluation
of assets
(Page 394
of the
Addendum)

(15) *Clauses 24 to 26 (Part II) and clauses 27 to 35 (Part III)*—Clauses 24 to 26 in Part II of our Schedule follow clauses 19 to 21 in Part II of the English Schedule. They seek to replace in a more comprehensive and orderly form the present provisions contained in sections 93(1A), 93(1B) and the latter part of section 93(1)(ff) by requiring that the auditors' reports as to profits and losses and dividends paid by the company should relate to five years instead of three years as at present, and that they should also relate to the assets and liabilities at the last date to which the accounts of the company are made up. Similar reports are required to be made by qualified accountants.

Auditors'
report
(Pages 394-
98 of the
Addendum)

to be named in the prospectus, if the proceeds of the issue are to be applied in the purchase of any business or any interest therein exceeding 50 per cent, with the exception that the report as to assets and liabilities must be as on a date not more than 120 days before the issue of the prospectus. This stipulation as to the purchase of interest in a business is in advance of the English Schedule and is necessitated by the large number of recent prospectuses issued after acquisition of interests in partnership firms (clause 25). Similar reports are also required where the company issuing the prospectus acquires shares of any other body corporate and by reason of such acquisition the latter company becomes a subsidiary of the acquiring company. If the company whose shares are acquired has any subsidiaries, similar reports as to its subsidiaries are also to be made.

Clauses 27 to 35 in Part III of the Schedule follow paragraphs 23 to 30 in Part III of the English Schedule and are more or less of an explanatory nature in relation to the provisions contained in Parts I and II.

Relaxation
of provisions
relating to
contents of
prospectus

56 The requirements as to the particulars to be included in a prospectus are obligatory. Section 39 of the English Act, however, provides for relaxation of some of these provisions where an application is made to a prescribed stock exchange for permission to deal or for a quotation and certificate of exemption is granted by the stock exchange to the applicant. We have not considered it advisable to follow this section in the present circumstances of the country.

Other
sections
relating to
prospectus
contained
in item 20
of the
Addendum
(Pages 375 &
89)

57 Having dealt with the more important provisions as to disclosure, we now turn to the other provisions in item 20 of the Addendum to the Annexure of our Report, which regulate other matters such as issue and registration of prospectuses, liability for misstatements, offers for sale, allotments, etc. These provisions are cast in the form of running sections numbered 92 to 102. We propose to deal briefly with the more important of these sections. The references to the sections below in italics are to those of the redraft.

Matters to be
stated and
reports to be
set out in
prospectus
(Pages 375 &
376 of the
Addendum)

58 *Section 93*—This section refers to the Schedule with which we have already dealt and seeks to incorporate the remaining provisions of section 93 and some of the provisions of sections 96 and 97 of our Act. It also seeks to follow section 38 of the English Act.

Expert's
consent to
issue of
prospectus
containing
statement
by him
(Page 376
of the
Addendum)

59 *Section 94*—This new section follows section 40 of the English Act, under which restrictions are imposed on the issue of a prospectus containing statements by an expert unless his written consent is obtained. This section enacts a wholesome rule intended to protect an intending investor by making the expert a party to the issue of the prospectus and making him liable for untrue statements.

60 *Section 95*—This section deals with the registration of prospectuses and follows section 41 of the English Act in important respects. We have also made certain additions by providing that where a prospectus names any person as auditor, attorney, solicitor, banker or broker of the company, the written consent of these persons should be filed at the time of registration. We would point out that the mere giving of this consent would not subject such persons to any liability unless any of them is acting as an expert. The need for the above provision arises out of the necessity for circumspection on the part of these persons before they permit their names to be cited in a prospectus. They should remember that the public attaches importance to the presence of well-known and respected names on the face of a prospectus and they should be careful not to allow themselves to be associated with enterprises about whose merits they have not made some serious enquiry. Sub-section (4) prohibits the issue of a prospectus more than 90 days after it had been filed with the Registrar. The English Act contains no such restriction, but we think it desirable to insert such a provision. If the issue is too long delayed, conditions may alter and what appears in the prospectus when registered may no longer be valid at the end of such a long period. Likewise, we consider that the period within which allotment must be made or subscription refunded should be reduced from 180 days to 90 days and we have provided for this change in sub-section (5) of the proposed section 101A in the Addendum.

61 *Section 97*—This follows English section 43 and seeks to amend section 100 of our Act. Two principal amendments may be noted. Under sub-clause (ii) of clause (d) to sub-section (2), the onus of proving that there was reasonable ground to believe that the expert was competent to make the statement contained in the prospectus has now been shifted from the plaintiff to the defendant. This gives effect to an important recommendation made in paragraph 43 of the Cohen report. The other amendment is contained in sub-section (3) which regulates the expert's liability. Under this sub-section, the expert is liable as a person authorising the issue of a prospectus, unless he can establish his *bona fides* under any of the pleas available to him under the sub-section.

62 *Sections 98 and 99*—These sections are taken together as they deal with criminal liability for false or fraudulent statements. The proposed section 98 follows section 44 of the English Companies Act, which is a new section. Under the provisions of this section, once the prosecution establishes the falsity of a statement in a prospectus signed by a director, etc., the onus is shifted to the defendant of proving either that the statement was immaterial or that he believed it to be true. An expert who has given the consent required by the proposed section 94 will not be deemed to be *ipso facto* a person who authorised the issue of the prospectus.

Section 99 deals with fraudulent inducements to persons to invest in shares of a company and is enacted on the lines of section 12 of the Prevention of Frauds (Investment) Act, 1939, which has for the first time in the history of company law of the United Kingdom penalised the reckless making of any statement, promise or forecast which was misleading, false or deceptive and thereby induced a person to subscribe to any issue of capital. We trust that these two sections between them will constitute a sufficient deterrent to unscrupulous company promoters against making untrue and deceptive statements in prospectuses with a view to obtaining capital from the public.

Interpretation of provisions relating to prospectus (Page 383 of the Addendum)

63 *Section 101*—This is based on section 46 of the English Act, which was designed to remove a defect from section 37 of the English Act, 1929, which is followed by the present section 100 in the Indian Companies Act. We have, however, added an important clause to this section intended to cover such omissions from a prospectus as are calculated to mislead intending investors.

Prohibition of allotment unless minimum subscription received (Pages 383 and 384 of the Addendum)

64 *Section 101A*—This section follows section 47 of the English Act. It amends those provisions of section 101 of our Act which impose restriction on allotment. Attention is drawn to sub-section (5) about refund of moneys on the expiration of 90 days if the conditions prescribed by the section are not complied with within the period. This point has already been dealt with in our comments on section 95 in paragraph 60.

Prohibition of allotment in certain cases unless statement in lieu of prospectus filed (Pages 384 and 385 of the Addendum)

65 *Section 101B*—This section follows section 48 of English Act and prohibits allotment in certain cases unless a statement in lieu of prospectus is filed. It brings within the compass of one section the present provisions of section 98 and sub-sections (7) and (8) of section 101. It may be noted that no allotment can be made until three days after the statement in lieu has been filed.

Effect of irregular allotment (Page 385 of the Addendum)

66 *Section 101C*—This section deals with effects of irregular allotment. It amends the present provisions of section 102 by extending the period from one month to two. In our opinion, one month is too short a period for the purposes of this section.

Application for, and allotment of, shares debentures (Pages 386 and 387 of the Addendum)

67 *Section 101D*—Under the existing law, a company is not required to keep its subscription list open for any period. An applicant for shares is also at liberty to withdraw his application before the allotment is made. This state of the law has set in motion two unhealthy tendencies to which our attention has been called by certain witnesses. It has been pointed out that in some cases the subscription list is closed on the very day it is opened, consequently, the public have no time to digest the contents of the prospectus, much less to obtain independent advice. Such precipitate action is evidently not in accord with the intentions of the legislature which, by prescribing

detailed particulars to be inserted in a prospectus, must be presumed to have expected the intending investor to consider the information contained in it before he risked his money in the particular venture. Further, a class of persons, colloquially known as 'stags' in the investment world, has arisen who prefer to make applications on a large scale with a view to reaping a quick profit on resale at a premium while the going is good, but who would be quick to withdraw the applications on the slightest prospect of the issue being found unpopular. Both these tendencies to which the Cohen Committee has also drawn attention in paragraphs 19 and 20 of its report are attributable to the present unsatisfactory state of the law and call for some action. A remedy is provided by the new section 50 of the English Act under which the subscription list is to be kept open for three days after publication of the prospectus. Having regard to distances in this country, in the section proposed by us, we have increased this period to five days. In the English section, a provision has been made preventing applicants from withdrawing their applications, unless any person who is a party to the issue of the prospectus, e.g., an expert, has withdrawn his consent by advertisement as provided by section 43 of the English Act which corresponds to the proposed section 97 in item 20 of the Addendum to the Annexure of our Report. We have retained this provision in the section proposed by us. We have, however, suggested an addition to sub-section (7) to the effect that the closing of the subscription list should be announced by the company, and that the allotment should be made and the notice of allotment given not later than the tenth day after such closing. These additions appear to us desirable.

(Pages 378—
81 of the
Addendum)

68 *Section 101E*—It is usual for a company to state prominently on the face of the prospectus that an application has been made or will be made to a stock exchange for quotation of the shares or debentures offered for subscription. The object underlying this statement is to give an assurance to the intending investor that the shares will become marketable and to induce him to subscribe for them on that basis. Although there is no guarantee that the application for quotation will be granted by the stock exchange authorities, the public assumes that permission is likely to be granted and is thereby encouraged to subscribe. Our attention has been drawn to the fact that in many cases in spite of this statement contained in the prospectus, the necessary permission is not sought or sought only after considerable delay. The Cohen Committee has dealt with this problem in paragraphs 23 and 24 of its report. We have tried to follow section 51 of the English Act, which has been specially enacted to meet the above situation. Under this section, where a statement of the kind referred to above is made in a prospectus, the company concerned has to make an application to the stock exchange for "permission to deal" before the third day after

Allotment
of shares
and debentures
to be dealt
in on stock
exchange
(Pages 387
and 388
of the
Addendum)

the first issue of the prospectus, failing which the allotment made would be rendered void. It further provides that if the application is refused by the stock exchange before the expiration of three weeks from the date of the closing of the subscription list or such longer period not exceeding six weeks as may, within the said three weeks, be notified to the applicant, the allotment would be void. In either of these events, i.e., where the application has not been made or where the permission has been refused, the company has to repay the moneys to the applicants. We have followed these and other incidental provisions in the section proposed by us subject to extension of the period for making the application from three to ten days. In view of the contemplated stock exchange legislation which, we understand, raises the question of uniform listing requirements, the provisions of the section proposed by us may need revision in the light of any decision on this point that may be taken by Government in due course. We would also point out that under our proposal, Government would have to prescribe the stock exchanges that should be recognised for the purposes of this section. This is necessary having regard to the number of small stock exchanges in the country. We would also invite attention to our proposals in respect of section 103 of our Act (*vide* page 299 of the Annexure), in which we have suggested a consequential amendment on the lines of section 109(1) (c) of the English Act, so that no company may commence business, till it has made sure that no money is liable to be repaid to applicants for any shares or debentures offered for public subscription, by reason of failure to obtain permission to deal from the stock exchange concerned.

It may be argued that provisions of the kind proposed by us might deter a company from making any statement in its prospectus about obtaining quotation for its shares from a stock exchange. This is too hypothetical a question to answer. All that we would like to record at this stage is that in view of the advantages offered by market quotations, companies might find it distinctly beneficial to apply for permission to deal. Be that as it may, the point will, no doubt, be duly considered by Government when they take a decision on the proposed stock exchange legislation.

It may also be argued that it would be placing too onerous a burden on companies to refund money in the event of the permission to deal not being granted by the stock exchange. This view is based on the argument that the requirements of the stock exchanges go beyond those of the Companies Act. The Cohen Committee before whom this point was raised has given an effective reply to this argument. In paragraph 24 of its report, the Committee observes—

“Some of the requirements of the London Stock Exchange Committee as to the information to be disclosed in prospectuses and advertisements go beyond the requirements of the Companies Act. The sanction behind these requirements and it

is a powerful one, is the fact that if the London Stock Exchange Committee are not satisfied, they can refuse permission to deal or defer decision on the matter. On the other hand, as the requirements are not laid down by the statute, the London Stock Exchange Committee can waive some or all of them in suitable cases. Their flexibility makes it possible for the rules to be more stringent and to afford the investor a greater measure of security than could be achieved by a statute except at the cost of hampering legitimate business. We recognised that particularly in recent years the London Stock Exchange Committee have exercised a beneficial influence in the matter of issues and we consider that they should approach the provincial exchanges with a suggestion that in respect of new issues it would be in the public interest for the rules and practice of the provincial exchanges to be brought into line with those prevailing in London."

We need hardly add that we fully agree with the above views

69 At page 298 of the Annexure of our Report, we have made a recommendation that sanction for the issue of new capital should not be given by the Controllor of Capital Issues, unless the prospectus conforms to the statutory requirements as to its contents. The requirements of section 93 about disclosure of information in a prospectus are often more honoured in the breach than in their observance. The interests of the public demand that they should be protected against being induced to part with their capital by those who indulge in the practice of issuing irregular prospectuses. Under our proposals, greater and fuller information is to be made available. It is, therefore, all the more necessary that some responsible authority should scrutinise the statutory information required to be disclosed in the prospectus before it is registered and issued. The need for such scrutiny has been recognised by several witnesses. In certain countries, *e.g.*, the United States of America and Canada, prospectuses are subjected to preliminary scrutiny at the hands of appropriate authorities. In a matter like this, prevention of mischief should be the main objective. When a company approaches the Controllor of Capital Issues for sanction to the issue of its capital, it is required to submit relevant information relating to its formation. It should not be, therefore, difficult for the Controllor of Capital Issues to scrutinize the contents of a prospectus, and to certify whether it discloses all the information required to be disclosed in it by the Act. This should not cause any avoidable delay. If our recommendation is accepted all issues of capital to the public, including those which, at present, enjoy exemption, will have to be brought within the purview of the Controllor of Capital Issues. This is

Sanction to
issue of
capital to be
subject to
prospectus
conforming
to statutory
require-
ments
(Page 298
of the
Annexure)

XVII, we have recommended the establishment of a Corporate Investment and Administration Commission and have suggested that the Commission should carry out those functions relating to capital issues control which are now performed by the Controller of Capital Issues. This recommendation, if accepted, will ensure co-ordination and effective compliance with the requirements of the Act relating to prospectuses.

CHAPTER VIII

COMPANY MEETINGS AND PROCEEDINGS

[Part IV of the Indian Companies Act—Sections 76 to 82]

70 The nature of shareholders' control over the affairs of a company has been the subject of much comment in recent discussions on the subject of company law reform both in this country and elsewhere. As the Cohen Committee observed—

Ineffective control by shareholders over affairs of company

“The illusory nature of the control theoretically exercised by shareholders over directors has been accentuated by the dispersion of capital among an increasing number of small shareholders who pay little attention to their investments so long as satisfactory dividends are forthcoming, who lack sufficient time, money and experience to make full use of their rights as occasion arises and who are, in many cases, too numerous and too widely dispersed to be able to organise themselves”

The Millin Commission in South Africa expressed itself in almost similar terms when it stated—

“The assumption underlying existing legislation is that shareholders are able to take an active interest in the company's affairs and will always be able to use their voting power to the company's advantage. The assumption may have been justified in earlier days when the capital of companies was largely in the hands of persons who knew enough about the business of the company to maintain an effective check on the activities of the directors they elected and were able to attend meetings to enforce their views. It is certainly not justified today when the shareholders in public companies are distributed over wide areas, and it is impossible that they can ever be gathered together in one place for attendance at company meetings.”

In addition to the factors mentioned above, some recent developments in corporate finance, *eg*, the growth of investment trust companies have further tended to widen the gap between the ultimate investor and those in charge of the management of his investments, while circumstances in this country have imposed a special handicap on them. The comparatively low standard of business knowledge and experience of the average investor, the absence of any well-informed and reliable financial press, and long distances,

which make it difficult for investors to combine for the exercise of their rights, have rendered them particularly ineffective

Possible remedies

71 There are only two ways in which the company law can partially redress the balance in favour of shareholders—first, by the fullest possible disclosure of the facts relating to the promotion, formation and working of joint stock companies, and secondly, by the enactment of such suitable provisions for the holding and conduct of company meetings as will enable active and competent shareholders to take an effective part in the business transacted in them. In the previous Chapter we have already recommended several measures designed to facilitate the disclosure of essential particulars relating to the promotion and formation of companies, and in Chapter XI we shall elaborate our proposals for a similar disclosure of essential information and data in company accounts. In this Chapter, we deal with the law relating to company meetings, and the record of company proceedings

Annual general meeting

Statutory meeting (Pages 247 and 248 of the Annexure)

72 The first meeting which a company must hold after it has obtained a certificate for commencement of business from the Registrar of Joint Stock Companies is the statutory meeting under section 77 of the Act of 1913. The scope of this meeting is limited to matters relating to the formation of the company and those arising out of the requirements of the statutory report and in respect of which we suggest certain amendments as will be seen from pages 247 and 248 of the Annexure of our Report

Annual general meeting (Pages 246 and 247 of the Annexure and page 347 of the Addendum)

73 The more important meeting is, however, the annual general meeting provided for under section 76 of the Act. In modification of the existing provision, we recommend that the first annual general meeting must be held within eighteen months of the incorporation of a company and thereafter within nine months from the end of each financial year, provided that in no case more than fifteen months should elapse between the date of one general meeting and that of another

We further recommend that the Registrar should have the power, in special circumstances, to extend the time during which a general meeting should be ordinarily held. The absence of any such provision in the Act of 1913 makes for needless rigidity, and our recommendation that the annual general meeting should in future be held, within nine months from the end of each financial year, justifies the grant of this discretionary power to the Registrar to be exercised only in cases of proved hardship. In default of the holding of an annual general meeting by the company, under section 76 of the present Act the Central Authority should have the power to call such a meeting, on the application of any shareholder, and to give such directions for this purpose as it may think fit. This is in

consonance with the provisions of section 131 of the English Companies Act, 1948, which confers this power not on the Court but on the Board of Trade

Procedure at general meetings

• 74 The manner in which the general meetings are called and conducted and the opportunities that they afford to intelligent shareholders to discuss the affairs of a company, largely determine the scope and extent of shareholders' control over the management of a company. The annual general meeting is particularly important, because of the nature of the business transacted thereat, e.g., election of directors, the adoption of the balance sheet, the profit and loss account and the directors' report, and the declaration of a company's dividend. Further, it is at the annual general meeting that ordinary shareholders have normally the opportunity of introducing resolutions on their own account.

Importance of the annual general meeting

75 We suggest extensive amendments in section 79 of the Act of 1913 which deals with general meetings. It will be seen from the redraft of this section which we have attempted (*vide* items 2 and 3 of the Addendum to the Annexure of our Report) that we have split it up into two different sections. Item 2 of the Addendum deals with general powers as to meetings and the procedure to be followed at such meetings including the manner in which votes should be taken. Item 3 deals with proxies and their rights which we discuss in paragraph 77. Briefly, our principal recommendations relating to meetings and the procedure to be followed there are as follows.

Provision as to meetings and votes (Pages 248 and 249 of the Annexure and pages 348-52 of the Addendum).

- (i) twenty-one days' notice should be given for all meetings of a company. A shorter notice will be permissible in the case of an annual general meeting only when all the members entitled to attend and vote agree to it in writing, and in the case of other general meetings only when members holding 95 per cent of the voting powers so agree,
- (ii) whenever special business is to be transacted before a general meeting, a statement setting out all material facts concerning the business should be circulated to the members along with the notice of the general meeting, so that the shareholders reading the notice may be able to understand what is intended to be discussed at this meeting. The nature of the interest, if any, of any director or managing agent or any partner or director of a managing agency firm or company in any such special business should also be indicated in the circular,
- (iii) voting rights should be exercised by all the registered shareholders except those who have

not paid calls due on their shares or in respect of shares on which the company has exercised its lien,

- (iv) where a poll is demanded, the chairman of the meeting must appoint two scrutineers to scrutinise the votes, and should also have the power to fill up vacancies in the office of scrutineers

It will be seen that our recommendations provide for 21 days' notice for all meetings of a company subject to the proviso that a shorter notice may be given in cases where all or a majority of the shareholders agree to it. We also make it obligatory for the directors to set out in the notice of meetings, where special business is to be transacted, all material facts concerning such business. It is not enough, in our view, merely to state the nature of the business, in order to assist the shareholders to appreciate the importance of such business, it is also necessary that all material facts concerning it should be circulated in advance. As regards voting rights, we contemplate that they should be exercised by all the registered shareholders except those who have not met the calls due on their shares or where the company has exercised its lien on such shares. The relevant section in the future Act should be so drafted that it prevents inclusion in the articles of association of clauses debarring shareholders from voting, unless they hold shares for any period preceding the date of the meeting or for other reasons. The appointment of scrutineers which we recommend should inspire confidence among shareholders. We understand that in the articles of some leading companies there are provisions for such appointment. We have taken care to provide that the appointment of scrutineers should rest entirely with the chairman, so that no deadlock may be created in the event of a scrutineer ceasing to act as such for any reason.

General
meeting
requisitioned
by share-
holders
(Page 248
of the
Annexure)

76 Section 78 of the Act of 1913 deals with the right of shareholders to requisition a general meeting. We consider that this section should be supplemented by a suitable adaptation of the provisions of section 140 of the English Companies Act, 1948, which empowers a specified number of shareholders to make use of the administrative machinery of a company to introduce resolutions on their own account at the annual general meeting and to inform other members of the purpose for which the resolutions are proposed to be introduced or the reasons for opposing any resolution submitted by the directors for consideration at the general meeting. The number of members necessary for a requisition under this section is (a) a number representing not less than one-twentieth of the total voting rights of all the members having a right to vote at the meeting to be requisitioned or (b) not less than 100 persons holding shares in the company on which there has been paid up an average sum per member of not less than a hundred pounds. This

section further requires that in the first instance the requisitionists must deposit with the company a sum reasonably sufficient to meet its expenses for circulating their resolution and/or statement. Sub-section (5) of the section sufficiently protects the company against any defamatory statement.

Proxies

77 The provisions relating to proxies constitute one of the least satisfactory features of the Act of 1913. The only reference to this subject in the Act is in sub-sections (1)(c), (d), (2) (e), (f) and (g) of section 79, and in regulations 63 to 67 of Table "A". In view of the important part which proxies play in the general meetings of a company, we have considered it desirable to embody our recommendations in a separate section which we have drafted on this subject (*vide* item 3 of the Addendum to the Annexure). Our recommendations broadly follow the provisions of section 136 and section 137(2) of the English Companies Act, 1948. The principal changes which we recommend are as follows —

(Page 250
of the
Annexure
and pages
351 and 35
of the
Addendum)

- (a) any member of a company should be able to appoint another person whether he is a member or not, to attend and vote for him at a meeting of the company, a proxy should also have the authority to demand or join in demanding a poll,
- (b) a proxy should not, however, have the right to speak except in a private company, and his right to vote on behalf of his principal should be confined to voting on a poll,
- (c) on a poll taken at a meeting of the company or a meeting of any class of members of the company, a member entitled to more than one vote or his duly appointed proxy need not use all his votes or cast all the votes he uses in the same way,
- (d) every notice of a general meeting served on a member should indicate clearly that he is entitled to appoint a proxy to attend and vote for him and that the proxy need not be a member of the company,
- (e) every member of a company should be entitled to lodge the instrument appointing a proxy with the company at any time within forty eight hours before the meeting, and any provision in a company's articles to the contrary should be void,
- (f) invitations to appoint proxies should not be sent to the members of a company at its expense and any officer of the company who knowingly

or wilfully contravenes this provision^a should be liable to a penalty,

- (g) an instrument appointing a proxy should be in writing under the hand of the member or of his attorney duly authorised or if the member is a body corporate, either under seal or under the hand of an officer or an attorney duly authorised. If the instrument is in the form set out in regulation 67 of Table "A", it should not be called in question by a company,
- (h) every member of a company should be entitled to inspect the proxies lodged with the company at any time during the period commencing twenty-four hours after the proxies have to be lodged and ending on the conclusion of the general meeting to which they relate

We trust these recommendations will go far to improve the position relating to proxies under the present Act. It will be noticed that we have gone farther than the provisions of section 136 of the English Act in providing for inspection of proxies by shareholders after previous notice to the company. We consider this provision necessary, as many articles of association contain clauses saying that no objection can be taken to the validity of a vote except at the meeting. In such cases it is only reasonable that if the shareholders want to object to any votes being recorded through proxies at a meeting, they should have some opportunity of examining these proxies and filing their objections.

Resolutions and notices

(Pages 250
and 251
of the
Annexure)

78 The Indian Companies Act, 1913, envisages three types of resolutions at a general meeting—an ordinary resolution, a special resolution and an extra-ordinary resolution. The purposes for which an extra-ordinary resolution is required under the Act are amongst others (a) to remove a director (section 86G), (b) to wind up a company voluntarily when it cannot continue in business by reason of its liabilities (section 203), (c) to sanction an arrangement between a company and its creditors (section 215), and (d) to sanction certain acts to be done by the liquidator in voluntary winding-up. We see no reason why the extra-ordinary resolutions in these cases cannot be replaced by special resolutions. In our view, company meetings will be rendered much simpler by the abolition of extra-ordinary resolutions, and their replacement by special resolutions, except where we have recommended an ordinary resolution, wherever the present Act provides for the former. Also in view of the fact that a uniform notice period of 21 days has been recommended for all resolutions there is no purpose now in providing for extra-ordinary resolutions. We, therefore, propose that the appropriate provisions of the Act should be amended accordingly.

We further recommend that twenty-one days' notice should be given of all resolutions to be passed at a general meeting—ordinary or special. The extension of the period of notice from fourteen to twenty-one days is necessary to enable shareholders to combine and canvass for proxies if they so desire. The present period of fourteen days is too short for all the processes that are involved before the shareholders can canvass opinion in favour of or against a particular resolution proposed to be considered at any meeting of the company. Following the provisions of section 142 of the English Companies Act, 1948, we also suggest that in certain cases, which we have indicated in the Annexure of our Report and in the Addendum attached to it a 'special notice' as defined in this section should be required. A 'special notice' of a resolution to be moved at a meeting of a company requires that the intention to move the resolution should be given to the company not less than twenty-eight days before the meeting at which it is moved and the company must give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting, or if that is not practicable, shall give them notice by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the articles, not less than twenty-one days before the meeting. Under the English Act, a special notice is required in the case of a resolution to remove a director (section 184) or to dispense with a director's age limit (section 185), or to propose the appointment of an auditor other than the retiring auditor (section 160).

Minutes of meetings

79 Section 83 of the Indian Companies Act deals with the minutes of general meetings and of the meetings of a company's directors. Our attention was drawn to the failure on the part of the managements of some companies to record in the minutes a fair summary of the proceedings of general meetings, inclusive of material questions asked and replies given and comments made. This in our view, is not a healthy practice and should be discouraged by positive provisions inserted in the section. In view of the fact that general meetings are usually very sparsely attended, a practice has grown up of circulating the minutes of such meetings to all shareholders. It is, therefore, essential that these minutes should contain a brief but authentic record of all that happens at general meetings so that the absentee shareholders may be in a position to form some reliable idea of what transpired at these meetings. We, therefore, recommend (*vide* item 4 of the Addendum to the Annexure) that the provisions of this section should be so amended as to provide explicitly that the minutes of the general meeting should contain a fair summary of the proceedings of such meeting, and in particular of all material questions

(Pages 251
and 252
of the
Annexure
and pages
353 and 354
of the
Addendum)

asked or comments made. We further recommend that such minutes should not be circulated or advertised at the expense of a company, unless they contain the matters mentioned above. It will be necessary for the chairman of the meeting to decide what is a fair summary of its proceedings or what questions asked or comments made would be deemed to be material for the purposes of the meeting, but a statutory obligation to cast the minutes in a particular manner will, we trust, be a useful safeguard against their manipulation by dishonest and unscrupulous persons.

As regards the minutes of directors' meeting, the only recommendation that we make is that they should record the names of those directors, if any, who dissent from any decisions arrived at at these meetings. Some witnesses questioned the desirability of such a provision. They argued that the decisions taken by a board of directors partook of the nature of a collective decision, and if it was made obligatory to record the views of dissentient directors, differences on a board might be encouraged. We have given due consideration to this point of view, but are unable to accept it. The concept of the collective responsibility of directors, however attractive in theory, is warranted neither by the facts about company management in this or other countries, nor by the fundamental postulates of company law. On the contrary, we feel that our suggestion will promote rather than hinder the sense of responsibility among directors and will provide a useful check on the errant elements among them, who now find it easy to hide the undue influence which they exercise over the affairs of companies under the cloak of unanimity.

CHAPTER IX

MANAGEMENT OF COMPANIES—DIRECTORS AND THEIR POWERS

(Part IV of the Indian Companies Act—Sections 83 to 86)

80 Under the English company law, directors occupy a pivotal position in the structure of joint stock companies. The Companies Acts of other countries, which are based on the English legal system also closely follow the English pattern both in the status and position which they accord to directors and the powers and responsibility which they confer on them. In the earlier days of joint stock enterprise, when business was comparatively simple and markets well-defined and easy of access, companies were actually managed by the directors. They met frequently, discussed even minor current affairs, and took decisions on the day-to-day conduct of the regular business. They had no doubt to appoint technical and administrative officers, but the management of the undertaking remained more or less in their hands. With the rapid growth in the size of corporate units, and the growing technical and administrative complexity of business, resulting largely from the combination of many different activities and the extension of markets, which necessarily involved intense specialisation in the processes of production and distribution, the character of corporate management also rapidly changed. The boards of directors had perforce to confine themselves to matters of general business policy, and over-all supervision of management, and to leave the day-to-day conduct of business in the hands of executives and salaried technical and administrative officers. In the case of the giant business corporations, even this was not possible. Many issues of business policy, arising out of day-to-day conduct of business, had to be left to top executives like Presidents and Vice-Presidents as in the United States of America or General Managers or Managers elsewhere, who because of their inevitable participation in matters of policy had to be brought on to the boards of these corporations. Nevertheless, the basic distinction between those who are in a position to direct and those who are accustomed to manage the affairs of a company, though considerably blurred in practice under modern conditions, remains by far the most dominant characteristic of corporate structure and the provisions of the company law whether based on the English or the continental legal system recognise this all-important fact.

Pivotal
position
of directors

81 Under the law in this country as in England, the directors are not only the agents, but in some respects and in some sense also the trustees of the company. As a company cannot act in its own person, its activities must be

Directors
regarded as
agents and
trustees of
company

carried on by its agents, *viz*, the directors, who are given such power as are vested in them by the memorandum and the articles of association. Within these limits they are competent to exercise all the powers of the company under the Indian Companies Act, except such as must be exercised by the company itself. At the same time, the directors are deemed to be the trustees of the company's money and property, and a long series of judicial decisions has consistently held that they are liable to make good the moneys of a company which they have misapplied on the same footing as if they were trustees. It is on these two fundamental concepts relating to the position of directors that we have based our recommendations under this Chapter.

We are fully aware that in India, the day-to-day management of companies is vested in managing agents. That, however, is no reason why the directors' position and responsibility should be whittled down. The directors are the representatives of the shareholders and are expected to exercise control over managing agents in this country in the same way as they exercise control over companies in other countries which are usually managed by managing directors or managers.

Appointment of directors

No body corporate to be appointed director (Pages 252 and 253 of the Annexure and page 355 of the Addendum)

82 Consistent with our general attitude towards directors, we recommend that no body corporate should be a director of a company (*vide* item 5 of the Addendum). Although in law a body corporate can stand in a fiduciary relationship with another body corporate, it is certainly better and more convenient that the directors should be natural persons. In practice also, it is desirable that one natural person should be a director rather than variable representative of a body corporate.

Number and nationality of directors (Page 228 of the Annexure)

83 In modification of the provisions of section 83A of the Act of 1913, we recommend that every public company and each of its subsidiaries shall have at least three directors and every private company, which is not the subsidiary of a public company, at least two directors. The latter proposal follows the recommendations of the Cohen Committee. In course of our enquiry the point was raised whether the Act should not prescribe that a minimum number of directors on a board should be persons of Indian nationality. As we have already noticed in paragraph 29, Chapter IV, the company law of certain countries makes a definite stipulation about the inclusion of a minimum number of the nationals of the countries concerned in the directorates of joint stock companies. For reasons which we have already explained, we do not make any specific recommendation on this subject, but leave it to Government to decide whether they would make any such provision in the statute or not.

Constitution of board of directors

84 Section 83B of the Act of 1913 provides for the constitution of the board of directors of a company Under this section, read with section 87 I of the Act which we have slightly amended (*vide* item 18 of the Addendum to the Annexure of our Report), not more than one-third of the number of directors on a board can be appointed by the managing agents of the company, and the remaining two-thirds should be persons whose period of office is liable to determination at any time by retirement of directors in rotation Several witnesses who appeared before us, urged that the managing agents should be precluded from putting up their own nominees for election in any of the vacancies in the two-thirds quota reserved for representatives of the general body of shareholders They contended that unless such reservation was made, the managing agents, by reason of their position and the influence which they exercise over the affairs of a company, were likely to "swamp" a board with their own nominees There is considerable force in this argument and many instances which were brought to our notice seemed to support this contention On the other hand, it was urged that if the nominees of the managing agents were men of integrity and calibre and succeeded in securing the suffrage of a large majority of the shareholders, it would not be in the interest of a company to prevent their election to the board of directors The provision for reservation of the two-thirds quota for retiring directors was introduced by the Amendment Act of 1936 and its object evidently was to secure the appointment of independent persons as far as possible Commenting on section 86F (contracts between companies and directors), which was also inserted in the Act by the Amendment Act of 1936, Mr S C Sen, the Special Officer appointed in connection with the above legislation, has in his book on the Indian Companies Act remarked "Section 86F curtails the privilege hitherto enjoyed by the directors of entering into contracts with the company and imposes on them the liability to obtain the consent of the board of directors which can now no longer be a packed body of persons representing any particular interest" As already stated, in many cases, boards are swamped by persons closely connected or associated with managing agents Thus the object underlying the amendment of 1936 has been largely defeated We have carefully considered the position and recommend that certain specified categories of persons, who may be deemed to be associated with managing agents or otherwise connected with them or to be under their influence, should be eligible for election in the two-thirds quota mentioned in sub-section (2) of section 83B of the Act of 1913, only if—

Election as directors of nominees of or persons under influence of managing agent (Pages 253 and 254 of the Annexure and pages 356 and 357 of the Addendum)

- (a) a special notice within the meaning of section 142 of the English Companies Act, of a resolution suggesting their appointment has been sent to the company and circulated by

of their association or connection with the managing agents and

- (b) at least 80 per cent of the votes of the members present in person or by proxy at a general meeting have been cast in favour of their election

(Pages 356
and 357
of the
Addendum

These two safeguards should enable the general body of shareholders to consider the claims of such persons for election on merits and to organise opposition to their election if they are considered unsuitable. In our redraft of section 83B (*vide* item 6 of the Addendum to the Annexure of our Report), we have enumerated the categories of persons who should be covered by the proposal we make, and do not, therefore, repeat the list here. It will be noticed that we have excluded from these categories the solicitors and share-brokers of a company, because, in our view, although managing agents may seek their advice or assistance in specific cases, they cannot be said to be in the same position as the other persons, enumerated in our redraft, who are either whole-time employees of the managing agents or are so continuously associated with them that they may be legitimately deemed to be directly interested in their business. The reform of the directorate is the key to the reform of company law. Hence we attach the utmost importance to this recommendation of ours.

Individual
voting of
directors
Casual
vacancies
(Pages 253
and 254
of the
Annexure)

85 We suggest two other minor amendments to this section. First, we recommend that votes on the appointment of directors whether in a public or a private company, should be recorded in respect of the individual candidates and not in respect of groups of them. Secondly, we suggest that casual vacancies in a board may be filled up by the other directors but the period of such casual appointments should not extend beyond the next ordinary general meeting of the company.

Qualifications and conditions of appointment of directors

(Pages 254—
256 of the
Annexure
and page
358 of the
Addendum)

86 Sections 84 and 85 of the Act of 1913 lay down two important conditions which must be fulfilled before a director can be appointed to a board. They are—

- (i) the consent in writing of the person concerned to act as a director which must be filed with the Registrar of Joint Stock Companies before the registration of the articles or the publication of prospectus or the filing of a statement in lieu of prospectus, as the case may be, and
- (ii) the acquisition by the person proposed to be appointed as director of the minimum share qualification necessary for his office.

This qualification should be obtained either before a person is appointed as director or within a period of two

months after his appointment. We recommend that, notwithstanding anything to the contrary contained in the articles of a company, a director's qualification shares should not exceed Rs 5 000 in nominal value, but that all directors other than technical directors or directors nominated by Governments should hold the qualification shares beneficially. We would make an exception to this rule in the case of shares held by a trustee for some third person, not being a managing agent of the company or an associate of a managing agent, and also in respect of shares held by a nominee-holder on behalf of some other company, not being a managing agent of the company or an associate of the managing agent, where the remuneration received by the nominee-holder as director is paid by him to such other company. The cases of technical or expert directors as also of directors nominated by the Central or State Governments fall outside the general rule. We recognise that it may cause hardship to them if they are compelled to hold their qualification shares beneficially, and recommend that they may be exempted from the operation of this provision.

We also recommend that the present requirement under section 84 of the Act regarding the obtaining of consent in writing of persons proposed to be appointed as directors should be extended to all first appointments of directors on the board of a company. The details of our recommendations have been set out in our redraft of section 85 (*vide* item 7 of the Addendum and in pages 254—56 of the Annexure to our Report).

Remuneration of directors

87 On the subject of remuneration of directors, we received conflicting evidence. The usual method of remuneration to a director is a fee for attending the meetings of the board, but some companies remunerate their directors by a monthly salary, while in still others a commission on profits in addition to the fee or the monthly salary is paid. On principle, we are not in favour of payment of commission to a director who is not also a full time employee of the company. Having regard, however, to the desirability of keeping the position flexible, we do not recommend any rigid scale of payment for directors or indeed any rigid method of remuneration. We would leave it to the company to decide how its directors should be remunerated, but would suggest that if any commission on profits is to be paid to the ordinary directors, the aggregate amount of the profits thus disbursed to them should not exceed 1 per cent of the "net profits" as defined in the Act in the case of companies managed by managing agents, in other cases this percentage may extend to 3 per cent of the net profits as defined in the Act. Such commission should however be payable only to directors who receive a fee for attending the meetings of the board and are not paid a monthly salary. The commission, when

(Pages 263
and 264 of
the
Annexure)

paid, should come out of the net profits, on which the remuneration of managing agents is based, and therefore, such commission, if any, as is paid to directors should be treated as part of the working expenses of a company. We would, however, suggest that no commission, subject to the above limits, should be paid to directors of any company, unless the payment is approved by a special resolution of the company passed after the commencement of the new Act, but no such resolution shall authorise the payment of such commission for a period exceeding five years.

Remuneration of directors or other officers not to be tax free (Pages 266 and 267 of the Annexure)

88 Following the provisions of section 189 of the English Companies Act, 1948, we further recommend that no remuneration payable by the company to any officer, employee or servant of the company, should be tax-free. As the Cohen Committee pointed out, the principal objection to the practice of making tax-free payment is that it creates a class of persons who are immune from any future increase in taxation. Further, this practice has the effect of making it difficult for shareholders to assess the burden imposed on a company by its salaries and wages bill.

Compensation for loss of office (Page 267 of the Annexure)

89 Sections 191, 192 and 193 of the English Companies Act deal with payments to directors for loss of office, transfer of a company's property to them for loss of office and the disclosure of the payment of compensation in connection with the transfer of shares of a company. Our own view is that no compensation should be payable to a director of a company as consideration for or in connection with his retirement from the office of director, but a managing director or a manager who is also a director, should not be prohibited from receiving compensation for loss of office in his capacity as managing director or manager or for any other services which he may have rendered to the company subject to the limitations recommended by us in Chapter X. We also favour the insertion of two sections on the lines of sections 192 and 193 of the English Companies Act on the clear understanding that no payment of compensation, in the circumstances mentioned in them, should be made to a director from the funds of the company.

Age of directors

(Page 254 of the Annexure)

90 The present Indian Companies Act contains no provisions about the age of a director or the number of directorships which he may hold. The first point was debated at considerable length before the Cohen Committee in England and was the subject of much comment in the Parliamentary discussions on the Amending Bill of 1947. The argument in favour of imposing an age limit on directors is that, having regard to the responsibility which attaches to their office and the increased obligations which we propose to impose on them in our recommendations, it is essential that persons appointed as directors

in a company should be physically and mentally alert and should be able to devote time and thought to the affairs of the company with which they are associated. Several instances were cited to us where directors by reason of their age, were unable to take any active interest in the management of the companies concerned. In such cases the retention in office of such directors, whatever may have been their past record of service, can hardly serve any useful purpose. On the contrary, by continuing to retain their seats on the board, they may be standing in the way of more active persons being elected. On the other hand the main argument against the imposition of an age limit is that a company may thereby be debarred from obtaining the advice of persons who though old in years, yet retain their mental powers to the full and by reason of their knowledge and experience may be able to render valuable services to the company. It has been further urged that, in the circumstances of this country, it would be wrong to impose an age limit, particularly as the number of experienced businessmen, who can act as responsible directors is extremely small. We have carefully weighed the *pros* and *cons* of this argument and consider that on balance it would be in the long-term interest of company management in this country that an age limit for directors should be fixed. This will incidentally open out opportunities for the utilisation of the services of younger persons with requisite training and experience in the management of companies. It would be relevant to point out in this connection that the Constitution of India imposes an age limit for the incumbents of the offices of Chief Justice of India and the Judges of the Supreme Court. If in exceptional cases, a company considers it essential to retain the services of a director who has passed the age limit, it would be open to it to do so in an advisory capacity. We, therefore, recommend that the age limit for directors should be fixed at 65. This recommendation should not apply to private companies other than subsidiaries of public companies.

Number of directorships which a director can hold

91 Neither in the English Companies Act nor in our own is any limit fixed on the number of directorships which a director can hold. The subject has, however, received a good deal of attention in company legislation on the continent. Thus the German Law of 1939 introduced a legal maximum of ten boards on which a director could serve although it was open to Government to grant exemptions in particular cases, while a war-time legislation in France (Law of 16th November 1940) reduced the number of directorships which a director could hold to 12, subject to the condition that no person might serve on the boards of more than 8 companies registered in France. One possible reason why the subject has not attracted much attention in the United Kingdom and the United States of America may be the comparatively small number

(Page 256
of the
Annexure
and
page 359
of the
Addendum)

of directorships, which an average director holds in those countries as compared with a director in India. In a recent statistical survey of 2157 directorships in a number of sample companies in the United Kingdom under the supervision of Prof Sargeant Florence,* it was revealed that the distribution of directorships was as follows —

Total No of directors	% of total	No of directorships
910	42	1
547	26	2 or 3
306	14	4 or 5
258	12	6 to 10
138	6	over 10

In companies with a capital of £500,000 comprising a total number of 623 directorships, the average holding in the above sample survey was found to be considerably more frequent

Total No of directors	% of total	No of directorships
81	13	More than 10
105	17	6 to 10
118	19	4 to 5
163	26	2 to 3
156	25	only 1

Similarly the investigations of the National Resources Committee in the United States of America some time before the War showed that in the 200 largest non-financial and the 50 largest financial corporations of the United States of America, the distribution of directorships was as follows —

1	director	he	9	directorships	each
3	"	"	8	"	"
6	"	"	7	"	"
6	"	"	6	"	"
19	"	"	5	"	"
48	"	"	4	"	"
102	"	"	3	"	"
303	"	"	2	"	"

*NOTE — *Vide* Journal of Royal Statistical Society, 1947 (pages 13 14) quoted by A B Levy on page 261 of Vol I of his book "Private Corporations and Control"

If these figures broadly represent the distribution of directorships in the United Kingdom and the United States of America, it can be hardly disputed that the maximum holding of directorships in those countries is much smaller than the maximum holding in this country. No dependable figures showing the distribution of directorships of joint stock companies exist in this country. Our attention has, however, been drawn to the evidence adduced before the Tariff Board in course of its enquiry into the cotton textile industry held in 1932 (*vide* Volume II, page 242) which shows that six gentlemen from Bombay held at that time directorships in 65, 42, 34, 29, 26 and 29 companies respectively. In course of our enquiry it has been brought to our notice that even now a holding of 15 to 20 directorships is common while a holding of 30 or more directorships is by no means unusual. The position clearly calls for some action. We recommend that a specific provision should be made in the Indian Companies Act that no person should hold more than 20 directorships at a time (*vide* item 8 of the Addendum to the Annexure), but that in counting this number, the directorships of private companies, of unlimited companies, of associations not for profit, as well as alternate directorships should be excluded. In view of the paucity of high-grade business ability in this country, we do not consider any further reduction in the maximum number of directorships, which we have recommended, desirable at this stage in the development of the country's economy. We would, therefore, strongly suggest that if Government accept our recommendation on this subject they should adhere to the figure which we have indicated.

Disqualification of and vacation of office by directors

92 The provisions of the Act of 1913 relating to the vacation of office of directors are scattered in different sections and do not seem to have been tied in with the provisions relating to the vacation of office by them. We suggest that the existing provisions should be rearranged in a suitable order and brought together under one section and should be tied in with the provisions of the present section 86 I of the Act. The Act provides for the following main disqualifications of directors—

- (i) disqualifications arising from failure to comply with the provisions of the Act which impose certain specific qualifications necessary for the appointment of a director, *vide* sections 84 and 85,
- (ii) the disqualifications imposed by section 86A of the Act,
- (iii) the disqualifications imposed by the provisions of section 86 I relating to the vacation of office of director

(Page 265
of the
Annexure)

We suggest that to the grounds set out in section 86 I for the vacation of office by a director should be added a further one of conviction for an offence which is non-bailable under the Criminal Procedure Code or any other enactment for the time being in force, and that the provision in clause (1) (d) of this section should be expanded to include failure on the part of a private company of which the director in question is a director to pay calls made on it

Company
(other than
a private
company) to
be debarred
from pres-
cribing
additional
grounds for
vacation of
director's
office
(Page 265
of the
Annexure)

93 We further suggest that sub-section (2) of section 86 I should not apply to any company except a private company which is not a subsidiary of a public company. It was brought to our notice, in course of the evidence tendered before us, that the management of several companies had taken advantage of this sub-section to include in their articles provisions to the effect that a director should resign, if he was asked by the other directors on the board to do so. We can understand the motives underlying such articles, but they are easily liable to abuse, and in any case the principle that a director on a board who may have been duly appointed by the general body of shareholders may be called upon to vacate his office at the instance of the other directors without any further reference to the members of the company is one which it is *prima facie* impossible to defend. We have, however, no objection to the articles of a private company which is not a subsidiary of a public company containing a provision to this effect.

Disqualifica-
tion on
certain other
grounds
from acting
as director,
etc
(Page 266
of the
Annexure)

94 To the list of disqualifications set out in the Act of 1913 we would add the disqualifications provided for in section 188 of the English Companies Act, 1948. The effect of this section is that a person guilty of an offence mentioned in it may be disqualified for a maximum period of five years from being concerned with or taking part in the management of a company without the leave of the Court having jurisdiction to wind it up. This disqualification may be imposed by any Court before whom a person is convicted of any offence in connection with the promotion, formation or management of a company or by any Court in course of winding up of a company, if it appears to it that the person has carried on the business of a company with intention to defraud creditors or for any fraudulent purpose or has been otherwise guilty of any fraud in relation to the company or has otherwise been guilty while an officer of the company of any breach of his duty to the company whether he has been convicted of any offence or not. We shall comment further on this provision of the English Act when we discuss the subject of winding-up in a later Chapter of this Report, but the arguments in favour of a disqualification to be imposed on the grounds mentioned above would seem to us hardly to require any elaboration.

95 Section 86B empowers a director or manager to assign his office to another person if so permitted by the articles or any contract and if such assignment is approved by a special resolution. On principle, the provision is open to objection. We have therefore prohibited this (*vide* item 9 of the Addendum to the Annexure of our Report). We have further provided that the alternate director should not be eligible for reappointment as a retiring director of the company if the original director's period of office is determined before his return. This provision fills up a lacuna in the present section.

Assignment of office by director (Pages 257 and 258 of the Annexure, and page 360 of the Addendum)

Disclosure of directors' interests

• 96 Sections 91A, 91B and 91C of the Act of 1913 provide for the disclosure of the interest of a director in any contract or arrangement entered into by or on behalf of the company, the right of a director to vote in respect of any such matter and the disclosure by a company of a director's interest in contracts of management. These provisions require tightening up in certain particulars. Thus, it is necessary to provide that the general notice which a director is entitled to give to the company of his interest in a particular company or firm under the proviso to sub-section (1) of section 91A should be given at a meeting of the directors or the director concerned should take reasonable steps to ensure that it is brought up and read at the next meeting of the directors after the notice is given. Otherwise, the general notice may well remain unnoticed by the other directors of the company and the object of giving such a notice may be easily defeated. In this connection attention is invited to the proviso to sub-section (3) of section 199 of the English Act. We further recommend that the general notice to be given under the same proviso should be renewed from year to year. As the Millin Commission in South Africa observed—

(Pages 92 and 293 of the Annexure)

“Under the present provisions, new directors joining the board cannot know of it unless they take the trouble to read the minutes, it may be, for years past, and it would be convenient for auditors if they were in a position to confine their research for such a notice to cover any particular transaction to the minutes of the year in which the transaction occurred”

The general notice to be given under the proviso to sub-section (1) is a relaxation of the strict requirement of this sub-section, and we agree with the finding of the Millin Commission in South Africa that there can be no hardship if it has to be renewed from year to year so as to appear in the minutes for each year in which it is to be effected.

97 Sub-section (3) of section 91A provides for the maintenance of a register in which particulars of all contracts or arrangements in which a director is interested have to

Register of contracts, etc in which

director is
interested
(Page 293
of the
Annexure)

be entered This register is open to inspection by the members of the company at its registered office during business hours In order that the register may serve its full purpose, we suggest that the particulars to be entered in it should include the dates of the contracts, the names of the parties and the dates of the board meetings together with the names of the directors voting 'for' or 'against' the contract or arrangement and of those remaining neutral We recommend that this register should be placed before the meetings of the board and should be signed by each director present at the meeting In view of the importance of the disclosure of directors' interests in any contract or arrangement, we recommend that the penalty for any contravention of the provision of this section should be increased to Rs 5,000 We also recommend that copies of the register or any extracts thereof should be available to members on payment of a prescribed fee

Prohibition
of voting
by interest
ed directors
(Pages 293
and 294
of the
Annexure)

98 Section 91B of the Act prohibits an interested director from voting on any contract or arrangement in which he is directly or indirectly concerned or interested and also provides that his presence shall not count for the purpose of forming a quorum at the time of voting and that if he votes his vote should not be counted This section which was amended by the Amendment Act of 1936 has been the subject of some criticism It was suggested to us that the provisions of the section should be strengthened by the requirement that an interested director should withdraw from the meeting of the board at which any subject to which he is interested is being discussed We do not accept the suggestion, for we consider that persons holding the position of directors should possess sufficient integrity and independence of judgment not to be influenced by the mere presence of one of their colleagues at a meeting of the board We have, however, provided that the interested director should not take part in the proceedings of such meetings Our other recommendation that the quorum at board meetings should either be two directors or one-third of the number of directors whichever is higher, which we have made later on in this Chapter would however, operate as a further safeguard, by doing away with the present practice of incorporating into articles of association clauses constituting one single director as a quorum when other directors are interested

We would also like to draw attention to an addition made by us in the existing proviso to the section, under which it would be competent for an interested director to vote in respect of any contract or arrangement with any other public company in which he is merely interested as a director and holds no shares beyond those necessary for his qualification as a director We have not considered it advisable to go further than this As in the case of section 91A, we have enhanced the penalty prescribed for contravention of the provision to Rs 5,000

We also recommend that the Central Authority should have the power to exempt any company from the operation of this section if Government inform the Central Authority that such exemption is in the public interest

99 As regards section 91C of the Act we propose that the whole section should be extended to contracts or arrangements for the appointment of managing directors. We also recommend that a provision should be made for the supply to any member of the company, who may ask for it a copy of the relevant contract on payment of a fee of six annas per hundred words

Disclosures to members in case of contract appointing a manager or managing director (Page 295 of the Annexure)

100 In course of our enquiry, we received some complaints about dealings in shares by directors of companies. By their very nature, it is difficult to get at the full facts about such complaints, but there can be little doubt that the evil exists, albeit on a limited scale. The complaints received from shareholders and the general public that, not infrequently, such dealings are detrimental to the interests of the company are also not entirely unfounded. It will be recalled that both the Cohen Committee in England and the Millin Commission in South Africa dwelt at considerable length on this problem. In paragraph 86 of its report the Cohen Committee observes —

Dealings in company's shares by directors (Pages 267 and 268 of the Annexure)

“Whenever directors buy or sell shares of the company of which they are directors, they must normally have more information than the other party to the transaction but the position is different when they act not on their general knowledge but on a particular piece of information known to them and not at the time known to the general body of shareholders, e.g., the impending conclusion of a favourable contract or the intention of the board to recommend an increased dividend. In such a case it is clearly improper for the director to act on his inside knowledge, and the risk of his doing so is increased by the practice of registering shares in the names of nominees. We do, however, consider that the law should be altered so as to discourage improper transactions of the kind we have indicated. Even if the legislation is not entirely successful in suppressing improper transactions, a high standard of conduct should be maintained, and it should be generally realised that a speculative profit made as a result of special knowledge not available to the general body of shareholders in a company is improperly made”

Similar observations were made in paragraphs 141 and 142 of the Millin Commission's report. At one stage of our enquiry, we considered the desirability of a provision in our Act on the lines of sub-section (3) of section 96A

of the Canadian Companies Act, 1934, which provides that no director of a public company should speculate, for his personal account, directly or indirectly, in the shares or other securities of the company of which he is a director and penalises the contravention of this provision by a fine not exceeding \$1,000 or by 6 months' imprisonment or by both fine and imprisonment. In course of our discussion, however, we were impressed by the difficulty of defining the phrase "speculative buying and selling of shares". We see no easy way of getting round this difficulty and, therefore, prefer to rely on the device suggested in section 195 of the English Companies Act, 1948. Under this section every company is required to maintain a register showing in respect of each director the number, description and amount of shares in and debentures of the company or any other body corporate, being the company's subsidiary or holding company, or a subsidiary of the company's holding company, which are held by or in trust for him or of which he has a right to become the holder whether on payment or not. Whenever there is a purchase or a sale of shares or debentures by directors, this register should also show the date, price or other considerations for the transaction. This register is maintained at the company's registered office, and is open to inspection by any member or debenture-holder of the company in the manner referred to in sub-section (5), and at all times by any person acting on behalf of the Board of Trade. We recommend the incorporation of a similar provision in the Indian Companies Act. In order that the provisions of this section may be enforced, it is necessary that an obligation should be imposed on the director of a company and on every person who is deemed to be a director to give notice to the company of all such matters relating to himself as are required under this section. Unless a director or a person deemed to be a director is required by law to intimate the relevant facts to a company, it will not be possible for it to maintain the register of directors' holdings up to date.

General powers of directors for management and supervision

Page 258
of the
Annexure
and page
361 of the
Addendum)

101 Compulsory regulation 71 of Table "A" of the Act of 1913 lays down the general powers and duties of directors as regards the management of a company. Having regard to our general attitude towards the position and responsibilities of directors as indicated in paragraphs 80 and 81 above, we have considered it desirable to recommend the insertion of a specific section in the Act dealing with this subject. Our draft (*vide* item 10 of the Addendum to the Annexure of our Report) of the proposed new section will show the nature of the duties and responsibilities which we propose to impose on directors and the limits of the delegation of authority by a board to managing agents and committees of directors. In sub-

section (1) of our draft, we have indicated the limits of the directors' powers *vis-a-vis* the company. In sub-section (2) we have enumerated the matters in respect of which the directors cannot delegate any powers to managing agents. These include—

- (i) the power to issue debentures,
- (ii) the power to make calls on shareholders in respect of moneys unpaid on shares of the company,
- (iii) the power to borrow moneys except within limits previously fixed by the directors at a board meeting,
- (iv) the power to invest the funds of the company, and
- (v) the power to make loans except within limits previously fixed by the directors at a board meeting

In the scheme of relationship between directors and managing agents that we visualise the above powers, subject to the specified limits, will be exercisable only by the directors of the company. It will be noticed that these powers cover some of the most important financial transactions in which a company may enter. It is our view that these important powers must be reserved for directors, and, if in particular cases, some of them have to be exercised by managing agents, they should be subject to such limits and conditions as the directors at a board meeting may specifically lay down. It is important that this delegation of powers to the managing agents should be by a resolution of the board passed at a meeting of directors and not by circular resolution. Any such resolution of the board in respect of any matter under sub-clause (iv) above should specify the limits and the nature of the investment to be made and in respect of the matters falling under sub-clause (v) should specify the amount of the loan and the purpose for which the loan has to be made. In sub-section (3), we have provided that no committee of directors, managers or managing directors should be authorised to exercise any power on behalf of the company which could not, by the provisions of the Act and the schedule, be exercised by a managing agent of such company. We have attempted to tie in the provisions of this new section with those of another section in the following Chapter relating to managing agents and their powers *vis-a-vis* the directors and shall have some further comments to make on this subject when we discuss the powers of managing agents.

Restrictions on the general powers of directors

102 Section 86H of the Act of 1913 imposes some restrictions on the general powers of directors. We have considered it necessary to amplify these powers and also to add to the restrictions. Thus we recommend that

(Pages 262
65 of the
Annexure

clause (a) of section 86H should be so elaborated as to prohibit the directors of a public company or of a subsidiary company of a public company from selling, leasing or otherwise disposing of the whole or substantially the whole of the undertaking of a company, provided that, where a company owns more than one independent undertaking, the directors should not dispose of any such undertaking, without the consent of the shareholders by an ordinary resolution. Secondly, we suggest a similar amendment in clause (b) of this section so as to prevent the directors from extending the date of repayment of any debt due by a director without the consent of a company in general meeting. The object of our first recommendation is to prevent the directors, without the consent of the general body of shareholders, from leasing out an undertaking to some other person, when the company is formed clearly for the purpose of working the undertaking and not for transferring the responsibility for its working to a lessee. We recognise that there may be occasions, when in pursuance of any general proposal for pooling the resources of an industry or for its controlled and integrated working, it may be necessary for some particular units in the industry to be leased out to some other units in it. But such pooling or controlled and integrated working of an industry does not come off overnight, and is usually the result of prolonged negotiations with the constituent units in an industry. It should not, therefore, be difficult for the directors of a company to consult the general body of shareholders when such proposals are under discussion and we have no reason to think that when the position is fully explained to the latter, as it must be, they will not accept the advice of the directors, particularly when such advice will be necessarily in the long-term interests of the company. In emergencies, such integrated working of an industry can be brought about only by special legislation which will necessarily supersede the provisions of the Companies Act. In these circumstances, we see no serious practical difficulty in depriving the directors of the power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking. In some special cases where a company owns more than one independent undertaking, the sale, lease or disposal of any one of these undertakings may so cripple or damage the activities of the company as to throw it almost out of gear. We have, therefore, considered it necessary to provide that in such cases the directors should not exercise the powers to dispose of any single undertaking without the consent of the shareholders. The object of the second recommendation about non-extension of the period of repayment of a debt by a director is self-evident and does not require any comment.

Disposal of
sale proceeds
of undertak-
ing acquired
by Govern-
ment or

103 Some cases have come to our notice where, on the acquisition of an undertaking by Government or by a local authority, the directors have disposed of the sale proceeds without any reference to the company. Such conduct on the part of the directors is clearly objectionable, for, if the

undertaking of the company is acquired by Government or local authority, the shareholders are entitled to have a say as to how the sale proceeds should be disposed of. We, therefore, recommend that on the acquisition of an undertaking by Government or by any local authority, the sale proceeds should be invested in trustee securities till the company in general meeting, has decided otherwise. It should be open to the shareholders to decide by an ordinary resolution as to how the sale proceeds should be used or disposed of and to lay down such conditions as they deem fit for this purpose, subject to the provision of the Act about reduction of capital.

104 Many cases have come to our notice where directors have borrowed money on the security of the assets of a company or otherwise, regardless of the needs of the company, without any reference to shareholders. This practice is so injurious to the interests of the company that we consider it necessary to impose a limit on borrowings by directors. We recommend that borrowings by directors shall not exceed the subscribed capital plus the free reserves of the company without the consent of the general body of shareholders. It is noteworthy that the rules of the stock exchanges in London and India impose restrictions on borrowings, and that numerous companies have complied with such restrictions.

Restrictions on some special activities of directors

105 Having regard to the position of directors as agents of the company and the fiduciary capacity which they hold, we consider it necessary to impose some definite limits on some of their activities as directors.

106 Section 86D of the Act of 1913 prohibits the grant of any loan to any director or the giving of any guarantee by a company for any loan contracted by any of the directors. This section which was inserted by the Indian Companies (Amendment) Act, 1936, and subsequently amended in 1938 with a view to bringing within its scope private companies in which any director of the lending company was a member, was an advance on the English Companies Act 1929, which contained no such provision. Commenting on the then existing lacuna in the English Companies Act of 1929, the Cohen Committee observed—

“We consider it undesirable that directors should borrow from the company. If the director can offer good security, it is no hardship to him to borrow from other sources. If he cannot offer good security it is undesirable to obtain from the company credit which he would not be able to obtain elsewhere.”

We should recommend (*vide* item 11 of the Addendum to the Annexure of our Report) that the prohibition contained in section 86D of the Indian Act should be extended to a

public company, the managing agent, manager or directors of which are accustomed to act in accordance with the directions or instructions of any director of the lending company. The object of this enlargement of the scope of the present section is to cover loans given to those companies which although registered as public companies, are really private companies. A director of the lending company may not ostensibly be associated with the management of the borrowing company but he may be the moving spirit behind it. We realize that it may not be easy to prove this in all cases but we feel that this provision coupled with our recommendations about investigation of the affairs of a company and of the ownership of its shares would prove useful in appropriate cases. In the redraft of this section which we attempt (*vide* item 11 of the Addendum to the Annexure of our Report) we have provided for an enhanced penalty for the contravention of the provisions of this section and also for the recovery of any moneys paid in contravention of this section and a corresponding reduction in the penalty where such recovery has been partially made.

Office or
place of
profit in
a company
or its sub-
sidiary
(Pages 260
and 261
of the
Annexure)

107 Section 86E of the Act of 1913 regulates the holding by a director of an office of profit in a company. As one commentator rightly observes "the object underlying this section is to prevent a director from being placed in the inconsistent position of being both a master and a servant". This section itself lays down several exceptions to the general rule. We would, however, recommend that the section should be so amended as to extend the prohibition also to holding of a *place of profit* under the company and that the consent of the company should be obtained at a general meeting by a special resolution. Some doubt has been expressed as to what is meant by the words "office of profit". It is, therefore, necessary to clarify the position by explaining these words so as to mean any office or place in a company in which a director obtains anything in the way of remuneration other than the remuneration to which he is entitled as a director. The requirement of a special resolution will further reduce the scope for abuses of this section. This however should not apply to the exceptions enumerated in the present section.

There is nothing in the present section 86E to prevent a director of a company from holding an office or place of profit in a subsidiary company. It is, therefore, necessary to provide that the prohibition contained in this section should extend to the holding of office or place of profit in a subsidiary company unless the director concerned returns the remuneration received by him from the subsidiary company to the holding company. The explanation to section 86E exempts a managing agent from the operation of this section. In view of the enlargement of the scope of this section to include places of profit, we suggest that similar exemption in favour of debenture-trustees is called for. They do not hold any office of profit but do hold a place of profit. We, therefore, suggest that the present

Explanation to section 86E should be so amended as to provide that for the purposes of this section a trustee for debenture holders shall not be deemed to hold a place of profit under the company

108 Section 86F of the present Act regulates contracts for the sale, purchase or supply of goods and materials to a company by a director. It provides that no director or firm in which the director is a partner or any partners of such a firm or any private company of which he is a member or director shall enter into a contract for sale, purchase or supply of materials to a company unless the consent of the directors has been obtained to such contracts. The section does not make it clear whether the previous consent of the directors would be necessary for such contracts or the subsequent approval of such contracts by the directors would suffice. We, therefore, recommend—

Sale, purchase or supply of goods by director to company (Pages 261 and 262 of the Annexure)

- (i) that the previous consent of the directors should be necessary for all such contracts,
- (ii) that in the absence of previous consent, the contract should be ratified by the directors at a meeting within a period of two months, provided that the previous consent of the board of directors to any contracts or the ratification of contracts where they were made without the directors' previous consent should be given at a meeting of the board of directors and not by circulation of the proposal

The restriction imposed in the present section is confined only to contracts for purchase, sale or supply of goods and materials. We suggest that contracts for under-writing subscription or purchase of shares and debentures of the company should also be brought within the scope of this section. We need hardly add that the amendment of the section which we propose should not extend to contracts already in existence

Board meetings

109 One reason given by many witnesses for the decline in the importance of directors in the management of joint stock companies was the infrequency and irregularity of the meetings of boards of directors, particularly in those companies which were under managing agents. Having regard to the position and status that we envisage for directors and the role that we wish them to assume in the affairs of a company, we consider it essential that meetings of the boards should be held at regular intervals and that all major questions of policy should be discussed at these meetings. From this point of view, we recommend that—

(Pages 265 and 266 of the Annexure)

- (i) meetings of the board of directors should be held at least once in two months, but where a meeting cannot be held for want of quorum that should not be taken to mean that the provisions of this

section have been contravened. In such a case, the meeting should stand adjourned to a later date,

- (ii) secondly, the quorum at board meetings should be either two directors or one-third of the number of directors whichever is higher

We consider that this recommendation is necessary because in several cases the quorum is kept unduly low, having regard to the number of directors. In this connection we would refer to article 2 of section 27 of the "General Corporation Law of the State of New York" which provides *inter alia* that a majority of the board at a meeting duly assembled shall constitute the quorum for the transaction of business and the act of a majority of the directors present at a meeting shall be the act of the board and that the byelaws may fix the number of directors necessary to constitute a quorum at a number less than a majority of the board, but not less than one-third of its number,

- (iii) thirdly, a resolution passed in circulation by directors should be valid only if it has been circulated to all the directors present in India and approved by a majority of those who would be entitled to vote on such resolution if it was placed before a meeting of the directors. Similar rules should apply to circular resolutions passed by a committee of directors,

- (iv) fourthly, a notice in writing of directors' meeting should be given to all directors in India

Record of
proceedings
of directors'
meeting
(Page 341
of the
Annexure)

110 In the previous Chapter (paragraph 79) we have already expressed our views on the manner in which the proceedings of board meetings should be recorded. We further suggest that regulation 75 of Table "A" should be made compulsory. It requires that the record of the proceedings of a meeting of directors should contain minutes—

- (a) of all appointments of officers made by the directors,
- (b) of the names of directors present at each meeting of directors and of any committee of directors,
- (c) of all resolutions and proceedings of directors and committee of directors

Under this regulation, every director present at any meeting of directors or committee of directors must sign his name in the register kept for the purpose

Retirement and removal of directors

(Page 262
of the
Annexure)

111 Regulations 78 to 86 of Table "A" deal with the retirement of directors, while section 86G of the Act of 1913 provides for their removal. We suggest that this section

should be replaced by section 184 of the English Companies Act but the proviso to sub-section (1) of this section should be suitably revised. The effect of this recommendation will be that in future a director of the company, whether under an agreement or not and notwithstanding anything to the contrary in its articles would be removable by an ordinary resolution of which special notice has been given. The right proposed to be given to a director, who is likely to be affected by any such resolution, to make a representation to the company at the company's expense will ensure the consideration of the *pros* and *cons* of any such resolution by the general body of shareholders, before a decision is taken by them to remove him. In our opinion, the general body of shareholders should have greater powers to remove a director with whom they are dissatisfied whether such director is under a contract of service or not.

Register of directors, managers and managing agents

112 Section 87 of the Act of 1913 provides for the maintenance of a register in which all pertinent information about directors, managers and managing agents should be kept and made available to the shareholders and the general public. Sub-section (1) (b) of this section provides that in the case of a corporation its corporate name, principal office and the name, address and nationality of each of its directors should be entered in the register. We further recommend that for practical convenience it would be desirable to provide under sub-section (2) that the changes to be notified to the Registrar of Joint Stock Companies in regard to the matters mentioned above should be recorded in a separate register. This suggestion may obviate the necessity of repeating, wholesale, changes in the returns to be supplied under this sub-section every time a change occurs. The time limit of 14 days prescribed for reporting any such changes may also be extended to 28 days.

(Pages 268
and 269
of the
Annexure)

We recognise that it will be extremely difficult for a company to maintain this register up to date unless an obligation is imposed on the directors, managing directors, managing agents or managers, as the case may be, to disclose such particulars as are necessary for the purpose of this section within twenty days of their acceptance of the office. We, therefore, recommend that a new sub-section should be inserted under this section in which this obligation should be cast on the directors, managing directors, managing agents or managers and a suitable default fine for failure to carry out this obligation should be imposed.

CHAPTER X

MANAGEMENT OF COMPANIES—MANAGING AGENTS, MANAGING DIRECTORS AND MANAGERS

Controversy
over
managing
agency
system in
the past

113 Over the last quarter of a century, no other aspect of company law in this country has attracted so much interest and provoked so much controversy as the managing agency system. Various authoritative commissions and committees, e.g., the Indian Industrial Commission, 1916-18, the Tariff Board in its report on the cotton textile industry in 1926 and again more elaborately in its report on the same industry in 1932, the Banking Enquiry Committee of 1931-32 and more recently the Fiscal Commission, the Income-tax Investigation Commission and the Planning Commission and several individual investigators have studied and commented on the different aspects of the system. Considerations of space prevent us from going over the same ground again, nor is it necessary for our purpose to do so. But, as an aid to the full appreciation of our recommendations in this Chapter, we consider it desirable to preface them with a few observations on the managing agency system in order to elucidate our general attitude towards it.

Origin of
managing
agency
system

114 The circumstances in which the managing agency system came to occupy its dominant position in the trade and industry of this country are well-known to students of the history of India's economic development in the nineteenth century. In origin essentially the result of British enterprise in India, the system was gradually developed by the pioneering efforts of the older British managing houses, which were the first to realise the potentialities of economic development in this country when the responsibility for carrying on the trade between Britain and India was transferred from the East India Company to private traders and merchants. The geographical factor of long distances from the ports to the centres of production of the few extractive and agricultural industries, which were the first to receive the attention of these business houses, facilitated the growth of this system, while the absence of an investing class and the lack of even the elementary facilities which were elsewhere provided by a capital market brought the trade and industry of this period more and more under the control of the managing agents, who in many cases provided both finance and the promotional services necessary for the flotation of new undertakings. Thus, history, geography and economics all combined to create and develop a system which, in some of its distinctive features, still retains its

unique character * While history has changed and geography has been countered by modern developments in transport and communication, this country still lacks a properly organised capital market. An integrated capital market, with issue houses or investment syndicates occupying a central position in it, provides the main channel through which private investments are made in all advanced countries of the world. In this country, the functions performed by these financial institutions have been hitherto largely carried on by the managing agents, who have thus been able to entrench themselves in a very strong position in the private sector of the country's economy. The critics of the system have, however, argued that its existence is, in itself, an impediment to the growth of an organised capital market. Whether this is so or not—and any argument over cause and effect is generally liable to be inconclusive—it is our view that the absence of an organised capital market has contributed to the development of the system. It has also to be remembered that organisations, built up by those reputable and established managing agency houses which have provided technical, managerial and financial advice and assistance and top-level control to the companies under their management, have contributed much to the development of industries for the benefit of all interests concerned.

The great majority of the witnesses who appeared before us were anxious to mend and not to end the system. This is also our view and appears to have been also the view expressed by implication in the reports of the Fiscal Commission and the Planning Commission. The former observed in paragraphs 210 and 225 of its Report as follows

“ Witnesses have drawn attention to malpractices on the part of some managing agents as a factor

*Recent developments in corporate form and organization in the advanced countries of the world have tended to affect the 'uniqueness' of the managing agency system. Thus, the Cohen Committee's report contains a passing reference to certain companies which 'are controlled by managing firms, managing agents or managing secretaries, who may exercise the functions of the board of directors' under agreements not altogether dissimilar to the managing agency contracts in this country (p 48, Cohen Report). Similarly, the Millin Commission comments on the working of the Witwatersrand Group System in the mining companies of South Africa. This system resembles the managing agency system in this country in important particulars inasmuch as the so called finance companies under it 'exercise powers of management and control' over the mining companies, without possessing at any time a majority shareholding in or having any legal right to nominate the directors of the companies concerned. The larger holding or controlling companies in the U.S.A. though structurally different from the managing agency system, sometimes perform functions which are not very different from the services rendered by managing agency companies by providing technical, managerial and financial advice and assistance and top level control in respect of these matters to the companies under their management and control. Nevertheless, the managing agency system still retains its structural distinctiveness and the administrative and financial relationships of the managing agents with the companies which they manage, disclose some features which are peculiar to this country.

discouraging capital formation This is not unfounded The question of introducing *improvements* in the managing agency system is under the consideration of the Government of India who have published for criticism tentative proposals suggested to them We hope that an early decision will be taken (para 210)

- “ In the early days of industrialisation, when neither enterprise nor capital was plentiful, the managing agents provided both, and India's well-established industries like cotton, jute, steel, etc, owe their present position to the pioneering zeal and fostering care of several well-known managing agency houses During the inter-war years, however, several abuses crept into the system; which were aggravated by the circumstances in which business was carried on during World War II and the general decline in standards that followed In Chapter XV we have already referred to the effect of these abuses on the formation of capital They also affect the quality of the direction and management of industries We reiterate the recommendation we have already made in paragraph 210” (para 225)

As will be seen from the following excerpts, the Planning Commission's comments are also more or less in the same strain

- “ If the industrial development of the country is to proceed along sound lines, in addition to the measures suggested above, it is necessary to change the present system of industrial management in the private sector in important respects The managing agency system under which industries are controlled and operated by independent firms has, in recent times, disclosed a number of features which are harmful to the growth of industry in future The working of the managing agency system and the extent of the abuses which it has brought into prominence during the post-war period require to be carefully investigated before any drastic *changes* in the system are made This is being done by the Company Law Committee at present” (p 161, para 29)

Having regard to all the circumstances, we consider that under the present economic structure of the country it would be an advantage to continue to rely on the managing agency system In taking this view we have not ignored the many abuses and malpractices in this system to which a reference has been made in the reports of the two Commissions from which we have quoted above or in other reports like the report of the Income-tax Investigation Commission and to which many of our witnesses drew our pointed attention

115 We feel that, shorn of the abuses and malpractices which have disfigured its working in the recent past, the system may yet prove to be a potent instrument for tapping the springs of private enterprise. Its adequacy and effectiveness in future, will, however, depend not merely on the promptitude and thoroughness with which the evils, which have clung to it are removed, but also on the energy, enthusiasm and foresight with which the managing agents conduct their business. While it will be for the leaders of the business community to provide the system with the quality and the momentum that will be demanded of it in future, the recommendations that we make are designed only to tighten up the relevant provisions of the Indian Companies Act, so that opportunities for current abuses and malpractices may be reduced to a minimum. The main directions in which in our view changes in the present Act are necessary are in regard to—

Continuance of the system
Need for tightening up of relevant provisions of the Act

- (i) the appointment of managing agents,
- (ii) the conditions of service of managing agents,
- (iii) the remuneration of managing agents,
- (iv) the powers of managing agents *vis-a-vis* directors,
- (v) the activities of managing agents in regard to borrowings, loans, contracts, sales and purchases, etc., made on behalf of the managed company

We shall deal with these subjects in the following paragraphs

Appointment of managing agents

116 Under the present Indian Companies Act an individual, a firm or a limited company can all be managing agents of another company. In recent years, particularly since the end of World War II, many managing agency firms have been converted into limited companies. The terms and conditions on which such conversions have taken place have from time to time given rise to comments and have incidentally raised the issue as to the desirability of appointing limited companies as managing agents. We are not concerned in this Chapter with the history of individual companies but the other issue raises a general question which can be appropriately discussed here. We received some evidence on the subject, and also considered the proposal in the Government Memorandum on the Amendment of the Indian Companies Act that limited companies should not be permitted to act as managing agents. Those who argue in favour of such prohibition base their case mainly on the limited nature of the liabilities of the members of a managing agency company and on the complications that have sometimes arisen in the management of a company on account of the difficulty of identifying the controlling interest in a managing agency company and the comparative ease with which such controlling interest can

Limited companies may act as managing agents
Private managing agency companies not to be managed by managing agents
(Page 270 of the Annexure)

change hands. We appreciate that in the case of a managing agent which is a company, the true nature of the controlling interest is not so readily visible as in the case of an individual or partnership, but we see no good reason for prohibiting the appointment of limited companies as managing agents. We, therefore, consider that the existing position in this regard should remain unchanged. We would, however, recommend that private managing agency companies should not themselves be managed by managing agents.

117 Sub-section (1) of section 87A fixes the limits of the duration of appointment of a managing agent to 20 years at a time. We received a good deal of evidence on this subject. While many witnesses complained that this period was too long, the representatives of the business community argued against any appreciable reduction of this period. It was urged that, under existing conditions, before a company could commence its business and run at a profit, a long time must necessarily elapse, particularly if the company was a manufacturing concern which had to depend for its plant and equipment on imports from abroad, and in any case a period of eight or ten years must elapse before any company could reach the peak of its activity. It was, therefore, argued that if the period for which a managing agent could be appointed was drastically reduced, the managing agent would have no incentive for spending time and money on a company of which he might well cease to be in control even before it had made any appreciable headway. This is a subject on which one can be hardly dogmatic. The period for which a managing agent should be ordinarily appointed depends on many factors, including the size and the nature of the undertaking, the extent to which it is dependent on domestic or foreign resources for its operation, the circumstances in which it has been launched, the general economic situation of the country and so forth. For the same reason, it is difficult to lay down one uniform maximum period for the appointment of a managing agent of all companies irrespective of the nature of the business they carry on. Nevertheless, after making due allowance for all these factors, we recommend that in future the period of a managing agency agreement should not exceed fifteen years in the first instance and renewals of the agreement should be limited to periods of ten years. We also recommend that in future no renewal, reappointment or extension of the term of a managing agent should be made except during the last twenty-four months of the agreement due to expire. The object of this recommendation is to thwart the practice, which has lately grown up, of securing from the present shareholders a renewal of a managing agency agreement long before the expiry of the existing contract. It was brought to our notice that, during the last seven or eight years, several otherwise reputable managing agency houses had resorted to this practice. Lately, this practice appears to have received a fresh impetus after the Government

Memorandum on the Amendment of the Indian Companies Act was published. Some of the proposals relating to managing agents in this Memorandum caused so much uneasiness among a section of the managing agents that many of them considered it prudent to secure from the shareholders a fresh lease of life before a new Companies Act was placed on the statute book. In our view, this practice is objectionable because it does not enable the shareholders of a company to assess the actual performance of a managing agent before they are called upon to consider his application for renewal of extension of term, and in any case it is wrong in principle that the future shareholders should be deprived of their right to have a say in the matter. Our recommendation is designed to forestall any premature action on the part of the managing agents. For this purpose we have felt it necessary to explain what constitutes the reappointment of a managing agent. In our view, the appointment of persons having the same or substantially the same interest in an outgoing managing agency should be deemed to be the re-appointment of a managing agent.

118 As regards existing managing agency agreements, we recommend that they should all be terminated on the 15th August 1959, unless they expire before that date. We choose this date because it will leave a reasonable period of time for the existing managing agency agreements to run out and also enable the management of the companies concerned to bring their new agreements in line with the recommendations of our Report if they are in due course accepted by Government and embodied in the new Indian Companies Act which we visualise. Also, in order to avoid hardship to the companies which had entered into managing agency agreements for the first time shortly before the publication of the Report, we consider it necessary to provide for this period of grace for them. It will be recalled that in sub-section (2) of section 87A in the Indian Companies (Amendment) Act, 1936, an analogous provision was made, under which, notwithstanding anything to the contrary contained in the articles of a company or in any agreement with the company, no managing agent appointed after the commencement of that Act was to hold office after the expiry of twenty years from that date, unless he was then reappointed or had been reappointed before the expiry of the said period of twenty years. The recommendations that we make as regards the termination of the existing agreements is, in principle, similar to this provision, except that we do not recommend the reappointment of the existing managing agents or the renewal or extension of their term at any time before the last twenty-four months of the expiry of the existing agreement, unless the remuneration has been brought in line with the provisions of the new Act. A suitable explanation of the term "reappointment", which we have suggested in respect of future managing agency agreements, should also be added to our recommendation about the re-appointment of existing managing agents.

Termination
of existing
managing
agency
agreements
(Page 270
of the
Annexure)

We would however, recommend that the time limit which we have suggested for the termination of existing managing agency agreements in order to bring them in line with our recommendations regarding the period for which they can be renewed in future should not extend to the adjustment of the terms of remuneration for the managing agents contained in these agreements. We suggest that the terms of remuneration prescribed under the new Act should also apply to all existing managing agency agreements after the expiry of two years from the coming into force of the new Act. As an inducement to an early adjustment of the terms of agreements in the light of our recommendation on this point we would, however, suggest that, should a managing agent be prepared to bring his terms of remuneration in line with the provisions of the new Act within one year of its enactment, with the agreement of the company concerned, he should be eligible for reappointment for a period of ten years and the original agreement will automatically elapse.

Apart from the above recommendations about the duration of appointment of future and existing managing agents, their reappointment or renewal and the extension of their terms, we have no other suggestions to make in regard to the other provisions of section 87A of the present Act.

Conditions of employment of managing agents

Removal of
managing
agents
(Pages 271—
77 of the
Annexure)

119 The provisions of section 87B(a) relating to the removal of managing agents seem to us to be inadequate and unsatisfactory. It might be argued that under this section, a managing agent can be removed only if he is convicted of a non-bailable offence, punishable under the Penal Code, in relation to the affairs of the company. Clearly, there may be many other circumstances in which a company would be justified in dismissing its managing agent. We, therefore, recommend as follows —

- (1) No resolution of a company should be required to dismiss a managing agent, who has been convicted of a non-bailable offence committed by him in relation to the affairs of the company. On such conviction, his office will stand automatically vacated, but if the offending member, director or officer of the managing agency company or firm, as the case may be, is expelled or dismissed within a period of thirty days from the date of conviction, or if the conviction is set aside on appeal, the managing agent need not vacate his office.

Where an appeal is preferred against a conviction, the directors of the company should have the power to require the managing agent to suspend the offending member, director or officer, as the case may be, and in the event of the managing agent not complying with this requirement

within a period of thirty days, the directors should have the power to suspend the managing agent till the final disposal of the appeal. For this purpose, any two directors of a company should have the power to call a general meeting of the company and the managing agent should also have the right to make a statement, orally or in writing, explaining his position to the shareholders.

- (11) A company should be competent to dismiss its managing agent by an ordinary resolution for any fraud or breach of trust, committed by the latter in respect of the affairs of the company irrespective of whether the managing agent has been charged and convicted of these offences or not, or in respect of fraud or breach of trust committed by a managing agent in connection with the affairs of any other company under his management and proved in a Court of law.
- (111) A company should have the power to remove a managing agent by a *special* resolution for gross negligence or gross mismanagement of its affairs. We have provided for a special resolution in these cases because we feel that such a resolution is desirable in the interest alike of the company and of its shareholders. What constitutes gross negligence or gross mismanagement is not always easy to determine, and what may appear to the shareholders to be a clear case of such negligence or mismanagement may not be held to be so by the Court. In such cases a company thus stands in considerable risk of being faced with a claim for damages for wrongful dismissal by the aggrieved managing agent. It is, therefore, in the interest of the company and the shareholders that a resolution terminating the agreement of a managing agent for gross negligence or gross mismanagement should be carefully considered and passed by a large majority of votes before it becomes effective. With the further remedy available under section 153D recommended by us we are of opinion that there would be further protection to shareholders in those cases where it is not otherwise possible for them to remove a managing agent.

120 Clause (c) of section 87B of the present Act permits a managing agent to transfer his office, if such transfer is approved by the company in general meeting. We recommend that in future such transfers must be approved by a special resolution of the company. Recent experience has shown that sometimes such approval is engineered by the holders of a small majority of shares, on promise of payment of a large compensation, in collusion with the transferee. It is, therefore, necessary to provide for a

Transfer of
office of
managing
agent
(Page 272
of the
Annexure)

suitable safeguard against such collusion and the needless imposition of an unwarranted burden on the company. We trust the requirement of a special resolution will secure this object to some extent.

Resignation
of office by
managing
agent
(Pages 272
and 273
of the
Annexure)

121 While the Act of 1913 provides for the transfer of his office by a managing agent it contains no provision for his resignation. In several recent cases, which have been brought to our notice, managing agents resigned their office in favour of new-comers, either in collusion with the latter or with their full knowledge, on the tacit understanding that they would receive suitable compensation from the company for loss of office on their resignation. Sometimes a managing agent who had thus resigned from his office was subsequently found to have committed gross irregularities in respect of the affairs of the company, but by the time this discovery was made, it was impossible to compel him to render accounts or to seek redress from him in any other manner legally open to the company. In order to prevent such abuses, we recommend that before a managing agent is permitted to resign from his office, the directors of the company should prepare a statement of its affairs up to date, along with a balance sheet and profit and loss account according to the provisions of the Act, and obtain a report from the auditors of the company on such balance sheet and profit and loss account. The resignation of the managing agent should be considered only after these documents have been laid before the board of directors and examined by it, and till then no managing agent should be permitted to resign. We would, however, add that the above recommendation should not affect the other rights and liabilities of the managing agent *vis-a-vis* the company, except in his capacity as managing agent. In other words, if the managing agent has any claim against the company otherwise than as a managing agent or if the company has a claim against him except in this capacity, such claim should be enforceable in a Court of law in the usual way.

Similarly, in a case where a managing agent is removed he should have the right to enforce any claim he has against the company subject to any counter-claim that the company may have against him.

Transfer of
managing
agency in
case of firm
or limited
company
(Pages 273—
76 of the
Annexure)

122 The proviso to clause (c) of section 87B of the Act attempts to define the circumstances in which a change in the partnership of a managing agency firm would be deemed to operate as a transfer in the office of the managing agent. Not only does the present provision appear to us to be totally inadequate, but there is no indication in the present Act of what constitutes a transfer of a managing agency in the case of limited companies. Section 87BB of the Act which was introduced by the Amending Act of 1951 has, however, placed certain restrictions on changes in the constitution of a managing agent of a public company where such managing agent is a firm or company.

In the case of a managing agent which is a public company and whose shares are officially quoted on a recognised stock exchange, we recommend that the exemption granted by section 87BB should continue, i.e., there should be no restriction imposed on the transfer of shares in such a company, although Government should continue to have the power of withdrawing such exemption in any case where they are convinced the exemption is being abused

As regards firms and companies other than public companies as defined above which act as managing agents entirely different considerations apply. In the case of a firm the test of identity should not be the continued existence of one of the original partners but the control of a preponderant interest in the partnership by one or more of the original partners. Likewise, in the case of a managing agency company which is not a public company with an official quotation on a recognised stock exchange, the test should be the retention of controlling interest therein amongst the shareholders who had such control when the managing agency agreement was entered into

We have experienced considerable difficulty in reconciling what we consider to be the fundamental right of a managed company to be managed by the managing agent whom it has appointed and not by some third party who in fact might have acquired a controlling interest in such managing agency firm or company, with the undesirability of imposing such rigid conditions on the acquisition of an interest in a managing agency firm or company as might preclude the introduction of persons into such firms or the acquisition of an interest in such companies by persons who might be able to contribute towards the management of the managed company. At the same time we realise that the holders of ostensible control as shown in the company's register may not be the holders of real control. Our conclusions are that the following conditions should apply to managing agency firms and companies other than public companies as defined above, and that such conditions should be the subject matter of a schedule to the Act. Our object in recommending that the conditions should be incorporated in a schedule to the Act is that Government would thereby be empowered, at any time, to amend the conditions, should they consider it desirable to do so. The conditions that we suggest are as follows —

- (1) that every managing agency firm or company to which the schedule applies should file with each company under its management at the time the managing agency agreement is executed a declaration stating the names of the partners of the firm and their respective interests in the firm and the interests of the co-sharers, if any, in the managing agency remuneration or, as the case may be, the names of the shareholders of

the managing agency company and their respective shareholdings, as at the date of the agreement. In the latter case, the declaration should further indicate whether the shares held are held beneficially, and if not, the parties on whose behalf they are held, and should further state that there is no arrangement whereby the control of the managing agency company is vested in persons other than the registered or beneficial holders. Such declaration should be signed by a partner or director of the firm or company. In the case of managing agency agreements in existence on the date the new Act comes into force, the declaration should be filed within three months of that date giving the particulars as on that date,

- (ii) similarly, a declaration so signed should be filed with each managed company on any change of partners in the firm or co-sharers or sale or transfer of shares in the company giving details of such change or of the shares sold or agreed to be sold or transferred, and the names of the persons foregoing the old and acquiring the new interest in the firm or transferring and acquiring the shares sold or agreed to be sold,
- (iii) that the declarations to be made under (i) and (ii) above should be available for inspection at all times during working hours by shareholders of the managed company. The shareholders should be entitled to copies of the same on payment of the prescribed fee,
- (iv) that the managing agency agreement should automatically and immediately expire if—
 - (a) in the case of a managing agency firm the collective shares of the persons who were the original partners at the date the managing agency agreement was entered into are at any time during the continuance of the agreement reduced to less than a moiety of their collective shares at the date of the agreement,
 - (b) in the case of a managing agency company, the voting rights attaching to the shares held collectively by the persons, who were beneficial shareholders in the managing agency company at the date when the managing agency agreement was entered into, are at any time during the continuance of the agreement falls below fifty-one per cent of the total voting rights attaching to the subscribed capital of the company. For the purpose of this clause, the qualified voting rights which we propose under paragraph 48 for preference

shares and any voting rights which may be attached to debentures should be included in computing the total voting rights in the company

We trust that the above recommendations, coupled with the provisions that we have suggested regarding the rights of minorities under our proposed new sections 153C and 153D, the disclosure by directors and persons deemed to be directors of their holdings in a company and the investigation into the ownership of shares, will prove a salutary check on any future trafficking in managing agency rights. If, however, this expectation is belied, the fact that the above conditions are embodied in a schedule should enable Government to modify them readily and to impose more restrictive conditions

123 We have referred in the foregoing paragraphs to the appointment and removal of managing agents. It now remains to consider the circumstances in which a managing agency agreement can be varied. When a company has entered into an agreement with its managing agent, it should not lightly vary the terms of his contract. After the period of his first appointment, it should be for the general body of the shareholders to decide whether the company's contract with its managing agent should be renewed or not, but once the company has decided in general meeting that the contract should be renewed, it will be clearly against the long term interest of the company for any party to the contract to vary its terms. We, therefore, recommend that the variations of a managing agency contract including any variation involving payment of remuneration to the managing agent less favourable to the shareholders than the existing remuneration, should be by a special resolution, unless such variation is made with the object of bringing the terms of the contract in line with the provisions of the Act, in which case an ordinary resolution should suffice.

Variation in
managing
agency
agreements
(Page 277
of the
Annexure)

Compensation to managing agents

124 The subject of compensation to managing agents has, in recent years, evoked much adverse comment from the critics of the managing agency system. One of the main charges against it has been the abuse of the compensation provisions by collusive arrangements or otherwise, and the opportunities for illegitimate gain which these provisions hold out for unscrupulous managing agents. It is, therefore, essential to tighten up the provisions of the Act on this subject. We have attempted a redraft of section 87B(e) of the Act of 1913 (*vide* item 12 of the Addendum to the Annexure of our Report). The redraft attempts to bring together the different provisions of the Act relating to compensation and then to recast them in the light of our recommendations. Briefly, we recommend that no compensation should be payable to a managing agent—

(Page 277
of the
Annexure
and
page 363
of the
Addendum)

- (a) if he resigns, otherwise than on reconstruction of the company or its amalgamation with another

company, and is not appointed managing agent or officer of the reconstructed or amalgamated company,

- (b) if the termination of agreement is in pursuance of the provisions of section 87B(a), i.e., for fraud or breach of trust or gross negligence or gross mismanagement or for any offence for which he can be removed,
- (c) if he is a party to a resolution terminating or procuring the termination of his agreement either directly or otherwise,
- (d) if the termination of his agreement is due to the winding up of the company on account of the negligence or default on his part, or
- (e) if the assets of the company on winding up are not sufficient to repay the shareholders' capital including the premium, if any

In all other cases compensation would be payable to a managing agent for the termination of his contract, but the amount of the compensation would represent the amount which the managing agent would have earned had he continued in office for the unexpired portion of his contract or for five years whichever is shorter. The basis on which the amount of compensation should be assessed should be the average remuneration of the managing agent for the last preceding five years or the average remuneration of the period of office actually held if the period is less than five years. We need hardly add that we do not wish to interfere with the right of the managing agent who has been wrongfully removed or dismissed to go to Court and to claim damages from the company just as the company in its turn will be free to make such counterclaims against the managing agent as it may be advised to do. We would, however, like to lay down that there should be no provision in the articles of a company or in any agreement between a company and its managing agent, which would authorise the payment of compensation in circumstances other than those in which we have considered such payment to be justified. We recommend that the provisions we have suggested relating to payment of compensation to managing agents should also apply to managing directors and managers.

Remuneration of managing agents

Method of remunerating managing agents (Pages 278-80 of the Annexure and pages 364 and 365 of the Addendum)

125 Section 87C of the Act of 1913 lays down the method by which the remuneration of managing agents of companies, other than insurance companies, and private companies which are not subsidiaries of public companies, is to be fixed. The provisions of this section have been assailed on the ground that they contain unsound and unhealthy features, are defective and contain too many loopholes through which unscrupulous managing agents can under the law unjustifiably supplement their income. Many instances were quoted to us where advantage had

been taken of these defects and deficiencies in the present provisions of the Act. We do not propose to go into details but recommend that section 87C of the present Act should be suitably amended in order that its provisions may be placed on a sound basis. We have attempted a redraft of section 87C (*vide* item 13 of the Addendum to the Annexure), indicating our detailed proposals on the subject.

126 First we propose that no managing agent's remuneration should exceed $12\frac{1}{2}$ per cent of the net annual profits of the company, whether such remuneration was paid in respect of his services as a managing agent or otherwise, except to the extent to which, under our recommendations which follow, they are entitled to receive remuneration for such additional services as they may render to the managed company. We have deliberately departed from the provision of sub-section (1) of section 87C and suggested a maximum limit to the percentage on net profits which a managing agent can earn as his commission. The methods of remuneration to managing agents vary from company to company. In some cases the commission is charged on net profits whereas in other cases it is based on turn-over or sales. In some cases the percentage on the net profits is kept low but the office allowance charged is comparatively large. In almost all cases, besides the office allowance and the percentage on net profits, howsoever calculated, managing agents also draw remuneration in the form of commission for various services rendered to the company. The rate of the commission also varies from company to company. For these reasons, in order to compare the total earnings of the managing agents in two concerns, account has to be taken not merely of the percentage on net profits to which they are entitled but also of the office allowance which they draw and the commission which they earn on purchases, sales and for other services. Without further detailed study of company statistics, it is, therefore, difficult to ascertain the real incidence of the managing agents' remuneration expressed as a percentage of the net annual profits of the company which can be deemed to be an average figure. In view, however, of the tightening up of the provisions of section 87B and our further recommendation relating to the other sources of managing agents earnings, we feel that the limit of $12\frac{1}{2}$ per cent on the net annual profits calculated in the manner indicated by us in paragraph 130 is reasonable and fair. The fear was expressed that this limit of remuneration together with the other restrictions that we recommend on the earnings and activities of managing agents might not induce entrepreneurs to invest capital in new or hazardous lines which ordinarily involves prolonged waiting before it can yield any profits. There is force in this argument. We have, therefore, provided that, in a suitable case, a company by a special resolution approves of the payment of a remuneration in excess of $12\frac{1}{2}$ per cent to its managing agent and the Central Authority that we propose for the administration of the Indian Companies

Quantum of remuneration (Pages 278 of the Annexure)

Act considers that such payment in excess of this limit is in the public interest, it would be open to the managing agent to draw remuneration in excess of the maximum that we have suggested

A suggestion was made to us that instead of fixing an over-all maximum, we should prescribe a scale of varying percentages applicable to companies of different size and carrying on different types of business. Theoretically this suggestion is attractive, but it is impossible to work any such scale in practice. Even if we had the benefit of a full and detailed analysis of company statistics at our disposal, we doubt if we could have drawn up any such scale. We have, therefore, refrained from pursuing this line of thought further, but express the hope that managing agents who are at present content with a lower percentage of profits as remuneration for their services as managing agents will not rush forward to take advantage of the maximum limit which we have recommended, merely because the law might permit them to avail themselves of this higher percentage

Minimum remuneration
(Pages 278
80 of the
Annexure)

127 Secondly, we recommend that where a company does not earn any profits or where its profits are inadequate to remunerate its managing agent, the latter should be entitled to a minimum remuneration based on the size and nature of the company and on other relevant factors, provided that this payment does not exceed Rs 50,000 per annum. A suggestion was made by some witnesses that suitable criteria should be laid down so that the minimum remuneration could be related to the size of the company and the nature of its undertaking. We have been unable to accept this suggestion for it is impossible to lay down any *a priori* scale of minimum remuneration, which would be applicable to all companies even though they are of similar size or carry on similar business. Instead, we recommend that it should be the duty of the shareholders of the company, by a resolution passed at its first or subsequent general meeting to prescribe a reasonable minimum remuneration for the managing agents, not exceeding Rs 50,000 per annum

Office allowance
(Pages 278
80 of the
Annexure)

128 Thirdly, we recommend that the provision in the present Act for the payment of office allowance to a managing agent be deleted. Presumably, the intention of the legislature in permitting an addition to a managing agent's remuneration, on account of office allowance, was to authorise a form of reimbursement of the out-of-pocket expenses incurred by him on behalf of the company. In practice, however, office allowance has, in many cases, to all intents and purposes, become an additional source of revenue to a managing agent. In the evidence that we received, no other aspect of a managing agent's remuneration was subjected to more constant and uncompromising criticism by the representatives of shareholders and the general public. Representatives of the business community, including the spokesmen of several reputable

managing agency houses, admitted that if managing agents were permitted to recoup the out-of-pocket expenses incurred by them on behalf of the managed companies, for such charges as office accommodation, rent and taxes, lights, fans, share of routine administrative and expert services, postage, stationery, etc, there was hardly any justification for them to draw any office allowance, although they seemed to take the view that the present arrangement was a convenient method of re-imbusement against the payment of office allowance and the abuses that have undoubtedly occurred in many cases, we recommend that no separate office allowance should be paid to a managing agent, but that he should be entitled to be reimbursed for all expenses incurred by him on behalf of the managed company and sanctioned by its directors

129 Fourthly, we suggest that except within the limits mentioned, no payment to a managing agent additional to or in any other form than those which we have indicated above should be sanctioned by a company. Sub-section (2) of section 87C of the present Act, which permits the payment of remuneration to a managing agent additional to or in any other form than the remuneration specified in sub-section (1) has been a prolific source of abuse, and in our view it is essential to close this major loophole in this section. Our recommendation to delete sub-section (2) of section 87C follows by way of a corollary to what is stated in paragraph 126

Prohibition of payment of additional remuneration (Pages 278-80 of the Annexure)

130 Fifthly, for the purpose of calculating the net profits on which managing agents' commission is to be calculated, we have suggested a revised definition of "net profits" in our redraft of section 87C (*vide* item 13 of the Addendum to the Annexure of our Report). It will be seen from the redraft of sub-section (2) of this section, that it has been divided into parts so that the deductions to be made, the items to be included and not to be included in arriving at the net profits may be clearly and separately brought out. We would briefly comment on the more important changes suggested by the proposed sub-section. The sub-section is divided into three parts. The first part comprises certain items which indicate the deductions to be made in order to arrive at "net profits" on which managing agents' commission would become chargeable. Item (a) which provides for deduction of working charges as at present, is for the sake of clarification amplified, so as to include directors' remuneration and any bonus or commission paid to any member of the staff, engineers and others. We have considered this clarification necessary as in certain cases bonus and commission paid to staff, workmen and others are not deducted, although there can be no doubt that they represent additional salaries and wages and are also debitable to revenue as working expenses. As to deduction of taxes in the nature of EPT and/or BPT these are taxes on business. A business cannot be said to have

Definition of net profits (Pages 278-80 of the Annexure and pages 364 and 365 of the Addendum)

earned a certain amount of profit unless these - taxes are debited to the working account of the company. This principle has been affirmed in the well-known case of Walchand & Co Vs Hindustan Construction Co Ltd (45 Bombay Law Reporter 1951) where it was held that these taxes should be deducted unless there is some provision to the contrary in the agreement. Some agreements contain such provision while some do not. We have, therefore, tried to place the position beyond doubt by providing for deduction of these taxes. As to deduction of interest on debentures and other fixed loans, although under the existing section, interest on loans and advances is deductible, interest on debentures is not so deductible. This is an anomaly inasmuch as expenditure in respect of interest on debentures is as much a revenue expenditure as expenditure in respect of interest on loans and advances. Moreover, it has to be remembered that by raising debentures, the company may continue to earn profits or may earn additional profits through expansion of its business. This would go to stabilise the managing agents' commission or increase such commission as the case may be. As regards item (f) which provides for deduction of losses of previous years and the amount of depreciation, if any, which might not have been taken into consideration in arriving at the net profits of the earlier years, in our opinion, it is clearly necessary to deduct the losses of the previous years, particularly when during years of losses or inadequacy of profits the managing agents would be entitled to charge minimum remuneration as recommended by us. To ignore these losses in calculating the commission for subsequent years would, therefore, be unfair. The true net profits of a company over a number of years are its profits earned in prosperous years less the losses incurred by it in lean years. Our recommendation will, therefore, ensure that while in prosperous years, the managing agents' commission would be calculated on the true net profits of the managed company, in lean years the managing agent would be assured of a minimum income to which he would be entitled for his services irrespective of the fortunes of the company. As to item (g) which refers to deduction of gratuity payable under any legal or contractual obligation, such gratuity is clearly a revenue charge and part of the working expenses of the company. It has been expressly mentioned for the sake of clarification.

Coming to the second part of the proposed sub-section, it refers to items which are not to be deducted. These items do not call for any particular comment.

As to the third part of the sub-section, this indicates items which are not to be taken into account in determining the amount of net profits. Items (a) and (b) are in accordance with the existing practice. Item (c) which refers to bounties or subsidies effects a change in the present practice by including them as part of the profits on

which the managing agents' commission can be charged. We consider that receipts in the form of bounties or subsidies should not be ignored in calculating the managing agents' commission. If a concern is helped to earn profits by protective duties and if such profits are treated as part of the normal profits on which the managing agents are entitled to charge commission, we do not see why, when such profits are earned through the receipt of bounties or subsidies, these payments should not be treated as part of the normal profits for the purpose of calculating the managing agents' commission especially when the bounties or subsidies, as we are given to understand, are treated as revenue receipts for purposes of taxation. We would add that, if in the circumstances of any particular case, it is deemed desirable that managing agents should not charge commission in respect of the amount of bounties or subsidies paid to a company, it would be open to Government to make suitable arrangements which would be binding on the company and its managing agents.

It now remains to deal with two further points arising out of the sub-section. One of them refers to deductions of depreciation. We have proposed that the amount of depreciation to be deducted should be the amount of normal depreciation allowable under the Income-tax Act and that special, initial or other allowances, or arrears of depreciation shall not be taken into account, provided however that the written down value of every asset shall be calculated after deducting normal depreciation only.

The other point to which we refer deals with those cases where as a result of certain arrangements between two companies, one company pays to the other company a portion of the profits. It seems to us *prima facie* unreasonable that the managing agent of the paying company should charge commission on the full profits including the portion paid to the other company, and that he should also charge, in the receiving company, his commission on the full profits including the amount received from the paying company. To permit this would be to allow the same profits to be subjected to the same managing agents' commission twice over. Our recommendation seeks to provide against this contingency.

131 The remuneration paid to a managing agent is for services rendered by him for managing the affairs of a company and it is *prima facie* impossible to justify the payment to him or to any of his partners any separate remuneration for occupying any other managerial office *vis-a-vis* the managed company. We were told that in some cases managing agents had put in their partners, or directors or managers of the private companies of which they were members, in managerial positions in the managed company, thereby indirectly augmenting their income or the income of their friends. To stop this practice, we suggest that a new section should be inserted at an appropriate place in the Companies Act, 1913, to the effect that no managing agent shall hold any other office or position in any company in which he is managing the affairs of the company. (Page 100 of the Annexure)

partner or a private company of which he is a member, or a director or manager of the private company from holding any office of profit in the managed company, in respect of which he can draw separate managerial remuneration, in addition to the remuneration paid to him under his managing agency agreement

Managing agent to draw remuneration after accounts have been passed

(Pages 278
80 of the
Annexure)

132 Cases were reported to us where managing agents had drawn their remuneration before the end of the financial year of the company. It is obvious that if a managing agent's commission is based on profits, such payment cannot be made till the company's profits have been assessed and audited and the audit report has been considered by the company. We, therefore, recommend that this practice should be prohibited. We are aware that many well-established and reputable managing agency houses do not draw such remuneration before the annual accounts have been laid before the company, but it would be desirable to lay down such a provision specifically in the Act. This does not, however, mean that a company should be precluded from sanctioning payment of the minimum remuneration to a managing agent in suitable instalments if it so desires.

Application of the new provisions to existing companies

(Pages 278
80 of the
Annexure)

133 We recognize that if our recommendations in the previous paragraphs relating to the remuneration of managing agents are given effect to immediately after the new Companies Act is passed, many of the smaller managing agency houses may be hard hit. In order to give them some time to adjust themselves to the new provisions about remuneration, we suggest that they should apply to all existing companies on the expiration of two years from the commencement of the new Act. As we have already stated in paragraph 118, it would, however, be open to any managing agent to bring his terms of remuneration in line with the provisions of the Act within one year of its commencement.

General powers of managing agents

(Pages 281
and 282
of the
Annexure
and
pages 367
and 368
of the
Addendum)

134 The position of the managing agents *vis-a-vis* the directors of a company has been the subject of much controversy since the Indian Companies (Amendment) Act, 1936, was passed. We do not think that the theoretical position has been ever much in doubt and in course of the evidence before us there was little difference of opinion on this point. Thus the Federation of Indian Chambers of Commerce and Industry, in their memorandum, observed—

"The other complaint that the managing agents wield real control and that directors are only their nominees subservient to their interests is also without substance. The whole basis of the Indian company law is that the supervision of directors shall prevail under all circumstances and at all events."

Another well-known house of managing agents, in its written memorandum, commented as follows —*

“The only real distinction between the two definitions of “managing agents” and “managers” is that, under the managing agency contract, it is open for the company and the managing agents to agree that the control and direction of the directors over the managing agents in certain matters may be excluded by the provisions of the managing agency agreement. The almost invariable practice, however, is against such exclusions and managing agency agreements provide that the management by the managing agents is subject to the control and direction of the directors. This is confirmed by a reference to compulsory article 71 of Table ‘A’ which is applicable to all companies and vests the general management of the business of a company in the directors, as it was intended, by the Amendment Act of 1936, to put the ultimate control of the company in the directors and the managing agents were placed in subordination to them”

We need not enter into any argument over the practice to which the statement refers or to the interpretation of compulsory regulation 71 of Table ‘A’, but quote this extract only to show how well is the theoretical position of managing agents *vis-a-vis* the directors understood by all responsible representatives of trade and industry. Nevertheless, it has come to our notice that many managing agency agreements contain clauses which, directly or indirectly, seem to ascribe powers and duties to managing agents which, far from recognising their subordinate position *vis-a-vis* the directors, purport to confer on the former powers, which override the authority of the latter in many important aspects of company management. Witnesses, who complained to us of this fact, argued that the inclusion of the words “except to the extent, if any, otherwise provided for in the agreement” in the definition of a “managing agent” as given in the Indian Companies (Amendment) Act, 1936, provided the basis of the present practice, under which many managing agents had arrogated to themselves powers and duties which really belonged to the directors. We have already suggested a revised definition of a “managing agent” in Chapter IV of our Report which will cover this point. It now remains to clarify in a substantive section the legal position of managing agents and their powers and duties *vis-a-vis* the directors. We have attempted to draft such a section (*vide* item 14 of the Addendum to the Annexure of our Report). In this new section, we lay down the general powers of managing agents *vis-a-vis* directors, while in the schedule attached

*Statement on the Memorandum for Amendment of the Indian Companies Act by Tata Industries Limited (page 4)

to it, we first provide for certain general powers to the managing agents and then enumerate certain specific powers, which, though within the limits of these general powers, would not be exercisable by them except with the approval of the directors. These specific powers include matters like--

- (a) the power to appoint any person as manager of the company,
- (b) the power to engage on behalf of the company any person, who is a relation of any director or of any partners of the managing agency company or firm or of any director of the managed company,
- (c) the power to compound or sanction the extension of time for payment of or satisfaction of any debt due to the company, from any associate of the managing agent,
- (d) the power to engage staff on behalf of the company, except staff whose remuneration is within the limits prescribed by the directors,
- (e) the power to purchase or sell capital assets, on behalf of the company, except when the purchase or sale price is within the limits prescribed by the directors

It will be recalled that in para 101 of Chapter IX where we have commented on the general powers and duties of directors *vis-a-vis* the company, we have recommended that the following powers should not be delegated to the managing agents —

- (i) power to issue debentures,
- (ii) power to make calls on shareholders,
- (iii) power to borrow moneys except within the limits fixed by directors,
- (iv) power to invest funds of the company,
- (v) power to make loans except within the limits fixed by directors

We would like to add that provisions have been made in clause (5) of the schedule enabling the directors to pass a resolution prescribing that the powers vested in the managing agents under clauses (2) and (3) of the schedule or any of them should not be exercised by the managing agents except under the control and direction of the directors. It is our hope that this new section and the schedule attached to it, read with the other section which we have proposed about the general powers of directors, will clarify the position alike of directors and the managing agents in the scheme of management of joint stock companies

and go far to dispel the confusion that has arisen as a result of the somewhat ambiguous wording of the definition of "managing agent" in the Amendment Act of 1936

Restrictions on some activities of managing agents

135 Sections 87D, 87E, 87F and 87H of the present Act deal with some of the most important activities of managing agents. They have been the subject of widespread comment and, in view of the abuses to which they have led, have done more to discredit the managing agency system than any other defaults or misdeeds on their part. We have, therefore, taken some pains to re-examine the provisions of these sections in the light of the comments that we received. We consider it necessary to recommend that these sections should be redrafted so that the existing loopholes in them may be closed and the possibility of their abuse may be reduced to a minimum. In the redrafts of some of these sections, which we have attempted (*vide* items 15 to 17 of the Addendum to the Annexure of our Report), and in our proposals on section 87F, we have embodied our recommendations. In this Chapter, we shall merely comment on the more important of our proposals.

136 In regard to loans to managing agents, our recommendations are more or less the same as in the case of loans to directors. We recommend that no company should make any loans or enter into any guarantee or provide any security in connection with a loan made by a third party to—

- (a) the managing agent of a lending company,
- (b) a firm of which the managing agent of the lending company is a partner,
- (c) any partner of the managing agent of the lending company,
- (d) any private company of which the managing agent or any of his partners or, where the managing agency is a private company, any officer of the managing agent is a member, director, managing agent or manager,
- (e) where the managing agent of a lending company is a body corporate, any subsidiary company of the managing agent and any director, managing agent or manager of such managing agent or of any subsidiary company of the managing agent,
- (f) where the managing agent of the lending company is a private company, any member or a director thereof

It will be noticed that in our recommendation, the ban against the grant of a loan or the giving of a guarantee is extended to persons, who are either the business associates

Need for closing loopholes in the existing provisions of the Act (Pages 282, 90 of the Annexure and pages 369-71 of the Addendum)

Loans to managing agent (Page 282 of the Annexure and page 369 of the Addendum)

of the managing agent or are otherwise pecuniarily interested in the managing agency. The provisions of section 87D have been widely abused by the grant of loans or the giving of guarantee to parties other than those mentioned in sub-section (1) of the existing section, and our redraft merely attempts to bring in the other possible parties through whom loans might be indirectly made available to the managing agent of the lending company.

Current
account
(Page 282
of the
Annexure
and
page 369
of the
Addendum)

137 We have also recommended the amendment of sub-section (2) of this section which deals with the opening of a current account by a managed company in favour of its managing agent. Many witnesses urged the abolition of this provision, but we feel that in those cases where a managing agent is in charge of a large number of concerns, it may be an advantage for the managed companies to permit the opening of a small current account in the name of their managing agent, so that all routine payments on behalf of the managed companies may be conveniently made through the managing agent's current account. In order that this privilege may not be abused, it is necessary for the board of directors of the managed companies to lay down limits upto which the managing agent may open a current account. We suggest that this limit should, on no account, exceed Rs 20,000.

As in the case of loans to directors, we suggest that contravention of this section should not be punishable merely by fine and imprisonment, but that the managing agent should also be made jointly and severally liable to the lending company for the repayment of such loans or for the making good of any sum which the lending company might be called upon to pay under the guarantee given or security provided by it.

Loans to
or by
companies
under the
same
management
(Pages 285
87 of the
Annexure
and
page 370
of the
Addendum)

138 Section 87E of the present Act regulates the making of inter-company loans. The efficacy of this section has been considerably affected by the phrase "under the management of the same managing agent". This section comes into play only when there is a common managing agent for several managed companies. It does not apply where one company is under a managing agent and the other is without a managing agent. Nor does it apply when neither the lending nor the borrowing company has a managing agent, although both may have common boards of directors, who are interested in a particular managing agency house and follow a common policy. Lastly, the provisions of this section can be and have been evaded, where the names of the managing agents of the lending and the borrowing companies are different, although, in fact, the constitution of the two managing agents and the policy they pursue in respect of the managed companies are the same. Further, the exceptions to the provisions of this section are so widely conceived that the purpose underlying it has, in practice, been largely defeated. In the redraft of this

section (*vide* item 16 of the Addendum to the Annexure of our Report) the main changes which we have suggested are—

- (a) the addition of an explanation to sub-section (1) which attempts to define what constitutes "same management" Under this explanation, two companies are said to be under the same management if any person occupies in respect of these companies one or other of the positions, namely, manager, managing director, managing agent, partner, etc., of the managing agency firm, member or director of the managing agency company where the managing agency is a private company, or where the majority of the directors of both the companies are common to each other,
- (b) amendment of the proviso to this section so as to provide that exemption from the provisions of this section should be given only for—
 - (i) loans by a holding company to a subsidiary,
 - (ii) loans by a managing agent to any company under his management,
 - (iii) giving a guarantee or providing a security by a holding company to a subsidiary, and
 - (iv) giving guarantee and providing security by a managing agent to companies under his management

As in the case of loans to managing agents, we recommend that in addition to the usual penalty for contravention of the provisions of this section, provision should also be made for the recovery of any loan made or security or guarantee given. It will also be seen that the loans are to be sanctioned by a special resolution of the lending company. We consider this as an essential safeguard having regard to the abuses that have come to light. Some of the witnesses urged that such transactions should be prohibited but we have not gone so far as circumstances may arise where a loan by a lending company to another company under the same or substantially the same management may be found to be in the interests of the shareholders of the lending company.

139 Section 87F of the present Act deals with inter-company investments. It prohibits a company other than an investment company from purchasing shares or debentures of any company under the management of the same managing agent unless such purchase has been approved unanimously by the board of directors of the purchasing company. In Chapter IX of our Report, we have recommended that in future the directors of a company should not delegate the power to make investments to its managing agent. So, in future, it will be only the directors

Purchase by company of shares of company under the same managing agent. (Pages 287 & 288 of the Annexure)

who will be able to make the type of investments contemplated in this section. Nevertheless, we consider it necessary to amend this section extensively. Our main recommendations are—

- (1) that restrictions should be imposed on the manner in which investments may be made by a company within a particular group in the shares of other companies in such group and a limit placed on the amount of such investments. Where any such investment is to be made by the directors without the previous sanction of a special resolution of the shareholders of the investing company the approval of all the directors for the time being in India should first be obtained at a board meeting and not merely by circulation. The limits that we suggest should be placed on such investments made by the board of directors are—

- (a) the amount invested in the shares of any company in the particular group should not exceed 10% of the subscribed capital of that company i.e., of the company in which the investment is made, and
- (b) the total amount invested in companies in the particular group should not exceed 20% of the subscribed capital of the investing company.

We appreciate that circumstances might exist where it would be in the interests of a company to make investments exceeding either one or both of the limits referred to. As a safeguard, however, we recommend that if such limits are to be exceeded they should be sanctioned by a special resolution of the investing company,

- (2) that the phrase “particular group” should be defined as meaning and including in relation to any company making an investment—
 - (i) the managing agent of the investing company if such managing agent is a company,
 - (ii) any company in respect of which the same person occupies both as regards the investing company and such other company one or other of the following positions, namely, manager or managing director or managing agent or partner of the managing agency firm or member or director of the managing agency company where the managing agent is a private company,
 - (iii) any company a majority of whose directors comprise a majority of the directors of the investing company,
- (3) that investment companies should be brought within the purview of the section as amended above and that all non-investment companies

- should annex to their balance sheets a list of companies within their particular group in which investments have been made, if any

We would exclude from the operation of the section all investments made by managing agency companies in companies under their management, private companies other than subsidiary companies of public companies and banking and insurance companies. Moreover, the section should not apply to investments by a holding company in any of its subsidiary companies nor should it affect existing investments

Our recommendations will, we hope, go far towards eradicating the wide-spread evils which have followed from many reckless inter-company investments in post-war years. In order to forestall possible attempts at making large scale investments of this type immediately after the publication of our Report, we suggest that in the new Companies Act it should be provided that our recommendations, if accepted, should take effect from the date of publication of this Report

It will be noticed that if inter-company investments do not exceed the limits prescribed in item (1) above our recommendation contemplates the unanimous consent of all the directors present in India and not merely of those present at the board meeting as laid down in the existing section 87F of the Indian Companies Act. It is for this reason that we have suggested that when such investments are within the limits prescribed by us they should not require the approval of the company by a special resolution

140 Section 87H prohibits a managing agent from engaging in any business on his own account which is of the same nature as and directly competes with the business of the company under his management. Several witnesses who appeared before us pointed out that the provisions of this section had been abused because of the loopholes offered by the words "on his own account". There was general agreement among the representatives of the business community that the section should be suitably amended so that the intentions of the legislature may be carried out. The object underlying this section is clear enough and the principle on which it is based seems to us to be unexceptionable. It stands to reason that after a managing agent has been appointed or reappointed he should not engage in any business as a principal which is of the same nature as a business carried on by the managed company, and directly competes with such business. In order that the section may be rendered effective we have redrafted this section (*vide* item 17 of the Addendum to the Annexure of our Report). We have attempted in this redraft to define the words "on his own account". These words should, in our view, include, besides the managing agent himself, a partnership firm of which the managing agent is

Managing agent not to engage in competitive business with a managed company (Page 289 of the Annexure and page 371 of the Addendum)

a member, a public company at a general meeting of which the managing agent is entitled to exercise or can control the exercise of 70 per cent or more of the voting power, or a private company at a general meeting of which the managing agent is entitled to exercise or can control the exercise of 20 per cent or more of the voting power. If the intentions of the legislature as embodied in this section are to be realized, all these persons should be debarred from carrying on the business of the same nature which competes with the business of the managed company. We realise that it may not be easy in all cases to trace the controlling interest in a company. We, however, feel confident that the recommendations that we have made later in our Report with regard to the investigation of a company's affairs and of the ownership of its shares would prove useful in the matter. We further consider it necessary that where a managing agent contravenes the provisions of this section, he should be called upon to render accounts as though he was carrying on the business in trust for the managed company. We would, however, add in this connection that such cases existing on the date of the publication of the Report as may be affected by sub-section (2) of our redraft of section 87H should be exempted from the operation of the provisions contained in the redraft. In our opinion in a matter like this such exemption granted in favour of companies existing at the date of the publication of our Report is fair and reasonable. If this recommendation is accepted, the redraft of section 87H will require suitable revision.

Purchase and sale by managing agents on behalf of managed companies

Appointment of managing agent as buying or selling agent (Pages 282-85 of the Annexure)

141 We now come to the important question of the right of the managing agents to act as buying and selling agents on behalf of their managed companies and also to retain the commission which they may receive on such purchases and sales from third parties. As we see the problem, it falls under the following three categories

- (a) where a managing agent is acting as a buying and selling agent for the managed company, commission being paid to him by the company,
- (b) where he is acting as a selling agent for some third party and receives commission from it in respect of sales made by it to the managed company, and
- (c) where there is a principal to principal contract between the managing agent and the managed company

142 As regards purchases on behalf of the company, we consider that it is the duty of the managing agent to make them and, therefore, he should be entitled to no additional remuneration from the managed company on this account. As regards sales also, it is his duty to arrange for the marketing of the finished products of the managed company to the furthest extent possible. In promoting the sales of a company's products, it may be necessary for the company to set up distributing centres in different parts of the country or outside the country. But in those cases, where the managing agent himself maintains his offices in other parts of the country or outside the country for his own business, it may be a distinct advantage to the company to utilise the services of the managing agent by making him a distributing agent in those places where he has his offices. In such cases, we consider that the managing agent should be reasonably remunerated for acting as a distributor of the company's products in addition to his normal remuneration as managing agent. In order that this provision may not be misused, we consider it necessary to provide for the following safeguards

Commission
on purchases
and sales by
managing
agent
(Pages 282
85 of the
Annexure)

- (i) any additional remuneration for the above purpose, which the company may agree to pay to the managing agent, should be sanctioned by the company in general meeting by a special resolution,
- (ii) secondly, the material terms of the proposed agreement with the managing agent for this purpose should be set out in the special resolution,
- (iii) thirdly, the resolution should specifically provide that payment to the company for any goods, materials or property supplied by it to the managing agent shall be made within a month from the date of supply,
- (iv) fourthly, all necessary particulars of the contract between the company and the managing agent for this purpose should be entered in the register of contracts and be open to inspection by the shareholders,
- (v) fifthly, the period of the contract between the company and the managing agent for this purpose should be limited to five years at a time

143 Where a managing agent is in receipt of commission from third parties in respect of goods supplied or services rendered to the managed company, we see no particular objection to his receiving any commission from such parties, provided that in all such cases the prices charged to the managed company for the goods supplied or services rendered are, in the opinion of the directors, market prices or are otherwise fair and reasonable. Since, in these cases, commission would be payable by third

Commissions
from third
parties
(Pages 282-
85 of the
Annexure)

parties, no expenditure would be incurred by the company, and if the stipulation about the quality and the price being competitive or fair and reasonable is enforced, no extra burden will be imposed on the managed company. We would, however, recommend that—

- (i) no managing agent should be permitted to receive such commission from third parties, unless he is expressly authorised to do so by an ordinary resolution of the managed company, and
- (ii) the details of the arrangement between the managing agent and the third company should be entered in a separate register which should be open to inspection under the provisions of section 91A of the Indian Companies Act

Contracts between managing agent and managed company regarding sale, purchase, etc (Pages 282-85 of the Annexure)

144 As regards principal-to-principal contracts which may be entered into between the managing agent and the managed company, we take the same view as in the case of commission from third parties received by managing agents. Provided the terms of the contract are considered by the directors of the managed company fair and reasonable, and the quality and the prices charged for the goods supplied or the services rendered to be competitive, we see no particular objection from the point of view of the managed company to any such agreement between it and its managing agent. The risk is that, in such transactions, the managing agent may try to secure an unfair advantage over the managed company by supplying goods and services of inferior quality or at more than market prices, but it should be the duty of the directors to ensure that both in regard to quality and price, the supplies received from the managing agent are reasonable and competitive. Such check by the directors on the supplies made to a company will have to be exercised in any case, whether they are made by the managing agent or others. However, as a safeguard against misuse of powers in this regard by a managing agent, we would provide that—

- (i) no principal-to-principal contract should be entered into, except with the approval of the company in general meeting by a special resolution,
- (ii) the period of such contract should not exceed three years at a time,
- (iii) the material terms of the proposed contract should be set out in the resolution,
- (iv) the resolution should specifically provide that payment to the company for any goods, materials or property supplied by it to the managing agent shall be made within a month from the date of supply,
- (v) the details of such contract should be entered in a separate register, which should be open to inspection under the provisions of section 91A of the Indian Companies Act

145 Except for such remuneration as is admissible to a managing agent, either as commission on sales or commission from third parties or in respect of principal-to-principal contracts which may be entered into between him and the managed company, we consider that the managing agent should not receive any other remuneration for any supplies made to the managed company or for any services rendered to it in whatever capacity it may be. If, however, a managing agent receives any remuneration otherwise than under the terms of our recommendations made in paragraphs 126 to 128 and 142 to 144 above, we consider it necessary that he should be called upon to render accounts to the company for all such remuneration whether it be by way of rebate, commission or otherwise. We would also recommend that all existing contracts between a managing agent and the managed company or between a managing agent and a third party relating to any of the matters discussed in paragraphs 142 to 144 should come to an end not later than five years from the date of the publication of the Report, and that no future contracts on these matters should be entered into except on such terms as we have suggested in our recommendations.

Managing agent to render accounts to managed company of all remuneration received otherwise than under terms recommended. Termination of existing contracts regarding purchase, sale, etc (Pages 282-285 of the Annexure).

Managing directors and managers

146 One of the principal lacunae in the Act of 1913 is the absence of any statutory provision relating to the terms and conditions of appointment of managing directors and managers. This lacuna is all the more noticeable, inasmuch as, while the powers and functions of managing directors and managers are in many respects similar to those of managing agents, unlike the latter, the conditions of appointment of the former have not been brought under control and regulation. We suggest that there should be statutory provision for this purpose and recommend the insertion of a new section in the Act on this subject. We have attempted a draft of such a section (*vide* item 19 of the Addendum to the Annexure of our Report). Our main proposals are as follows —

(Pages 290 and 291 of the Annexure and pages 373 and 374 of the Addendum)

- (i) no firm or body corporate should be appointed as a manager,
- (ii) no person should be eligible to be appointed as a manager or a managing director for more than two companies and any such appointment for the second company should be made only with the unanimous resolution of the board of directors passed at a board meeting,
- (iii) the term of appointment for a manager or managing director should be limited to five years at a time, although an exception should be made in the case of technicians and consultants,

- (iv) if a managing director or manager is to be paid any commission or remuneration in the shape of commission on profits, it should be based only on net profits as defined in section 87C of the Act,
- (v) compensation, if any, admissible to a managing director or manager for loss of office would be payable in the same circumstances as compensation would be payable to a managing agent (*vide* item 12 of the Addendum to the Annexure)

CHAPTER XI

ACCOUNTS AND AUDIT

[Part IV of the Indian Companies Act of 1913—Sections 130 to 136 and sections 144 and 145]

147 In the history of company legislation in this country as in the United Kingdom, no other aspect of the law shows such continuous and marked advance as the provisions relating to company accounts and audit. As we have mentioned in an earlier Chapter, recent developments in company law have tended to concentrate on the need for the fullest measure of disclosure as to the particulars about the promotion and formation of a company and the manner in which its accounts are cast and audited. For, it is now generally recognised that it is only by such disclosure that the financial position of a company and its state of affairs as a going concern can be correctly assessed. It will be seen from Appendix IV where we have traced the evolution of the accounts and audit provisions in the Indian and the English Companies Acts, that the provisions of the Indian Companies Act relating to accounts and audit have been always in advance of corresponding provisions in the Companies Acts of other countries, and particularly of the provisions in the English Companies Act. We have borne this fact in mind in our further consideration of this subject. While, therefore, we have not hesitated to recommend the adoption of some of the provisions contained in sections 147 to 163 of the English Companies Act, 1948, relating to accounts and audit, and in particular of the provisions contained in the Eighth and the Ninth Schedules of that Act, we have taken care to retain those provisions in the Indian Companies Act which were in advance of the then existing legislation when the Indian Companies (Amendment) Act of 1936 was passed and which still retain their usefulness. We have also recommended the adoption of several other provisions, which we consider to be a further advance upon the provisions of the English Companies Act, 1948.

Advanced character of the accounts and audit provisions of the Indian Companies Act (Page 304 of the Annexure and pages 400—420 of the Addendum)

Accounts and Audit provisions of the English Companies Act, 1948

148 The English Companies Act, 1948, contains important changes in respect of the accounts and audit provisions. While the Act does not provide for statutory forms for the balance sheet and profit and loss account, material requirements relating to them have been embodied in the Schedules attached to it. The provisions in regard to accounts are contained in the Eighth Schedule. Part I of the Schedule contains the general provisions as to balance sheet and profit and loss account, Part II contains special provisions applicable to a holding or a subsidiary company, Part III deals with special classes of companies and Part IV with the interpretation of the Schedule. The Ninth Schedule deals with matters to be expressly stated in the auditor's report. According to the Eighth Schedule, important particulars are required to be given in the balance

Contents of the Eighth Schedule in the English Companies Act, 1948

sheet and the profit and loss account The provisions concerning the balance sheet run into ten clauses, while those relating to the profit and loss account are contained in clauses 12 to 14 The special provisions referred to above are contained in clauses 15 to 22, while the exceptions for special classes of companies are set out in clauses 23 to 26 Clauses 27 and 28 relate to the interpretation of the Schedule

Nature of the balance sheet and the profit and loss account under the English Companies Act, 1948

149 Under the provisions of the English Companies Act, 1948, the balance sheet has to exhibit a true and fair view of the company's affairs as at the date of the balance sheet, while the profit and loss account has to give a true and fair view of the profit or loss of the company for the outgoing year Similarly, the profit and loss account has also to disclose certain material particulars including material amounts, if any, in respect of which the items in the profit and loss account are affected by transactions of a sort not usually undertaken by the company or otherwise by circumstances of an exceptional or non-recurrent nature or by any change in the basis of accounting

Exceptions in favour of banking and discount companies in the English Companies Act, 1948

150 It should, however, be noted that certain exceptions have been made in the case of banking or discount companies in respect of which some particulars are not required to be disclosed This is due to the fact that the statute now requires that the balance sheet should give a true and fair view of the company's affairs at the end of its financial year, while the profit and loss account should disclose a similar view of its profit or loss for its financial year A strict compliance with this statutory requirement would necessitate the fullest disclosure of secret reserves and the object of the exemption granted to banking and discount companies is to prevent such disclosure

Audit provisions in the English Companies Act, 1948

151 The material departure from the existing provisions of the law relating to the contents of the auditor's report in the English Act of 1948 is that the auditors now have to state—(i) whether they obtained all the information and explanations which to the best of their knowledge and belief were necessary for the purposes of their audit, (ii) whether, in their opinion, proper books of account were kept by the company so far as appeared from their examination of the books and proper returns adequate for the purposes of their audit were received from branches not visited by them, (iii) whether the balance sheet and the profit and loss account dealt with in their report are in agreement with the books of account and returns, (iv) whether in their opinion, and to the best of their information and according to the explanations given to them, the said accounts give the information required by the Act in the manner required, and in the case of the balance sheet, give a true and fair view of the state of the company's affairs as at the end of its financial year, and, in the case of the profit and loss account, of the profit or loss of the company for its financial year, subject to the non-disclosure of those matters, which under Part III of the Eighth Schedule to the Act are not required to be disclosed

152 The question relating to the accounts of companies was considered at some length by a sub-committee of the Indian Accountancy Board, which examined the Cohen Committee's report, and, after taking into consideration the existing provisions of the Indian Act, suggested a revised form of balance sheet. That sub-committee was of opinion that it was not desirable to prescribe a standard form for the profit and loss account, but that the Act should contain a schedule stating in clear details the items to be included in it. The conservatism which prevails in the United Kingdom as to the disclosure of particulars in the accounts of a company arises from the fear that such disclosure may give away secret information to a competitor and thereby prejudice the interest of the investor himself. A similar fear was also expressed, during our enquiry, by some chambers of commerce which apprehended that if separate particulars in respect of opening stocks, purchases, sales and closing stocks were to be shown, the unit cost of production would be revealed. Another argument that was advanced by certain witnesses was that the final accounts of a company should not be loaded with unnecessary details which would make them cumbrous and not easily intelligible. We have carefully considered these objections and find that they are largely based on misunderstanding of our proposals. The unit cost of a commodity cannot be determined without a disclosure of the quantities produced, and our recommendations do not require such disclosure. The truth is that, not infrequently, much useful information, which the shareholders ought to have so that they may exercise a healthy check over the activities of a company, is held back from them on the plea of secrecy. We, therefore, consider that the form of the balance sheet and the contents of the profit and loss account should be such as would make available to the shareholders as much information relating to the affairs of the company as it is possible to disclose without giving away information which could be detrimental to the interests of the company. It may be pertinent to mention that our suggestions in this respect are in line with the recommendations of the Institute of Chartered Accountants.

Need for fullest possible disclosure in "balance sheet and profit and loss account"

Form of the balance sheet and schedule relating to the contents of the profit and loss account

153 In the English Companies Act, the accounts provisions are not brought together in one schedule or in one set of forms. Besides the Eighth Schedule which deals with accounts, several sections of the Act also call for information relating to different aspects of company accounts. Without assembling all this information it is not possible to obtain a complete picture of the particulars that have to be disclosed in the balance sheet and the profit and loss account. We have, therefore, attempted to bring together all the information to be shown in these documents under one standard form of balance sheet and in one schedule relating to the contents of the profit and loss account. The nature of these documents, as conceived by us, is fully set

Nature of form of the balance sheet and the profit and loss account recommended by the Committee (Pages 400-402 of the Addendum)

out in two schedules in our redraft of section 132 (*vide* item 22 of the Addendum to the Annexure of our Report) It has not been possible for us to draw up a standard form for the profit and loss account, as we have done for the balance sheet, because there are many different types of industries and business interests, for which one 'set form' may not be suitable This was also the view expressed by the Institute of Chartered Accountants

Books of Account

Nature of the books of account to be kept by a company (Page 400 of the Addendum)

154 Sub-section (1) of the present section 130 requires companies to keep proper books of account in respect of the matters enumerated in it There is, however, nothing in the section to indicate which books should be kept or how they should be kept In the absence of any specific provision on this point, books of account may well be kept in a manner which may fail to give a true and fair view of the state of the company's affairs and to explain its transactions We have attempted to fill up this lacuna in the present Act by adopting the provisions of sub-section (2) of section 147 of the English Act, (*vide* our redraft of section 130 in item 22 of the Addendum to the Annexure of our Report)

Balance Sheet

Form and contents of the balance sheet that the Committee recommends

155 The form of the balance sheet suggested by us is intended to disclose much more information than would be ordinarily conveyed by a balance sheet drawn up in accordance with the Eighth Schedule of the English Companies Act 1948 We have tried to arrange the headings and groupings on a more rational basis The more important of the changes that we propose are as follows —

Capital and Liabilities

- (a) *Share Capital* Improvement has been suggested with regard to the statement of share capital It will be noticed that three categories have been suggested, one being shares paid for in cash, the second being shares allotted as fully paid without any payment in cash, and the last category being shares allotted as fully paid up shares by way of bonus The last category has been specially suggested because bonus issues resulting from capitalisation of reserves stand on a different footing from shares allotted to promoters at the time of floatation or shares allotted in pursuance of a contract without any payment in cash

With regard to calls unpaid, details of amounts unpaid by managing agents and directors will have to be separately stated, together with particulars of the amounts unpaid by partners or directors of managing agents according as the managing agents are a firm or private company

It will be noticed that we recommend that in future only the authorised and subscribed capital should

be shown in the balance sheet with a view to avoiding the ambiguity in the phrase "Issued Capital"

- (b) *Reserves and Surplus* Under this heading the debit balance of the profit and loss account, if any, will have to be deducted from the Reserves and Surplus to show a correct picture
- (c) *Secured Loans* Under this heading, mention will now have to be made of guarantees given by the managing agent and/or directors in cases where loans have been guaranteed by them. Particulars of loans taken from subsidiaries are also to be stated
- (d) *Contingent Liability not provided for* Under this head we recommend that in addition sheets, some further particulars should be disclosed in order to explain more fully the nature of the liability

Property and Assets

- (e) *Fixed Assets*—Under this head, the change that we suggest is that the words "Plant, Machinery" should be read as "Plant and Machinery". This will obviate objections of a trivial nature taken by certain shareholders. Similarly, the expression "Furniture" should be replaced by the words "Furniture and Fittings"
- It should be noted that we have proposed that the original cost as well as additions and deductions should be shown separately, and in regard to depreciation, the amount written off or provided should be shown under each head. Where reduction of capital has taken place, or where there has been a revaluation, particulars in this behalf should be given for five years. A similar recommendation has been made in respect of the writing up of assets, the necessary particulars being required to be given for three years. To meet any practical difficulties that may arise, we have suggested that in cases where original cost figures cannot be ascertained, the valuation shown by the books may be given, and where any of the assets have been sold and their original cost cannot be ascertained, the amount of sale proceeds may be shown as a deduction
- (f) *Investments*—(i) Investments in the different classes of shares should be distinguished. This is necessary as the shareholders should know in which classes of shares investments have been made
 - (ii) Aggregate amounts of the company's quoted and unquoted investments together with the market value of the former should be shown. This will enable the quoted and unquoted investments to be parcelled out separately

- (111) As will be seen from Note (1) appended to the balance sheet, a list of investments separately classifying trade investments and other investments is to be attached to the balance sheet, stating the names of the companies in which the investments have been made, together with the names of their managing agents, if any, and also indicating the amounts invested in each of them. In view of widespread abuses in the investment of the funds of a company in the shares or debentures of another under the same or substantially the same management, and of the recent practice of using the funds of a company for carrying on cornering activities or for acquiring control over other companies, we have considered it necessary to provide that a detailed list should be annexed to the balance sheet, so that the shareholders may see at a glance how their funds are being utilised. We have, however, suggested that investments made by a managing agency company in the shares, debentures, etc., of the companies managed by it, as also investments made by investment companies, should be exempted from this requirement. It is obvious that these companies require different treatment, but an over-riding provision requires that investments made by investment companies in unquoted shares or in shares of private companies should be specified.
- (g) *Current Assets*—As to the item “stock-in-trade” which falls under this head, the amount in respect of raw materials should be separately shown where practicable. In addition, “Works-in-Progress” should also be stated. We are not in favour of a particular mode of valuation, i.e. “cost or market value whichever is lower”, as this will not be appropriate for different types of industries and concerns and different types of items which find a place under the stock inventories. We would, however, draw attention to Note (m) which provides for a statement by the directors that, if any of the current assets do not have a value on realisation, in the ordinary course of business, at least equal to the amount at which they are shown as valued, the fact that the directors are of that opinion should be mentioned. This requirement will go a long way to assure the shareholders that, unless the directors otherwise state, the values shown against the items in the balance sheet are not less than their realisable value.
- (h) *Sundry Debtors*—As to “Sundry Debtors”, as the reserves have got to be deducted, they would have to be shown separately. We have also

thought it fit to amplify the particulars needed under this heading. Thus, particulars in respect of the debts due by directors or other officers of the company or any of them, either severally or jointly with any other persons, or debts due by firms or private companies respectively, in which any director is a partner or director or a member will have to be shown separately. These remarks also apply to the particulars to be given in respect of loans and advances.

- (1) *Cash and Bank Balances*—We have separated the heading “Cash and Bank Balances” from “Current Assets” because, this is a specific item, which should be distinctly marked out and shown as such. The heading “Balance on Current Accounts with Managing Agents” is being retained because we have elsewhere recommended in our Report that the retention of certain balances with managing agents for current commitments should be allowed.
- (2) *Miscellaneous Expenditure and Losses*—We would like to invite particular attention to our recommendation that commission or brokerage on underwriting or subscription of shares or debentures should be shown separately and so also discount allowed on the issue of shares or debentures. With regard to interest paid out of capital during construction, the requirement suggested is that the rate of interest should also be stated. The debit balance of the profit and loss account is to be shown on the Assets side provided there is no general reserve from which it can be deducted.

Notes at the foot of the form of the Balance Sheet

With regard to the notes on the balance sheet, they are mostly self-explanatory and we need refer only to the more important of them. Under Note (c) the shares held by the ultimate holding company and its subsidiary companies will have to be shown separately so far as subsidiary and sub-subsidiary companies are concerned. “Short Term Loans” have been defined as all loans, excluding those which are due more than one year from the date of the balance sheet. Under Note (e), specific provision has been made to the effect that depreciation written off or provided should be allocated under the different asset heads and deducted in arriving at the valuation of fixed assets. It appears that under the English Companies Act, 1948, the aggregate amount in this behalf has to be stated and the question arises whether, in the absence of any specific provision, its allocation under the different items is to be separately shown. Although the correct view is that this allocation should be made and the directors of the company should have no other alternative, nevertheless we have thought it fit to state this fact in clear terms. Under Note (1) as regards “Particulars of Loans and Advances in respect of amounts due by Managing Agents” we have

suggested that such amounts taken either severally or jointly with any other person should be separately stated, as also the amounts due from other companies under the same managing agents or their associates. It will be observed from Note (j) that particulars of any redeemed debentures which the company has power to issue are to be given and according to Note (k) where any of the company's debentures are held by a nominee or a trustee for the company, the nominal amount of the debentures and the amount at which they are stated in the books of the company have also to be stated.

Debts out-
standing for
more than
three
months to be
treated as
loans or
advances
(Page 416
of the
Addendum)

156 In our opinion it is necessary that a debt should be distinguished from a loan or an advance. To prevent loans or advances being granted under the guise of debts, we have provided in a foot-note to the balance sheet that a debt outstanding for more than three months should be treated as a loan or an advance. We would, however, recommend that there should be a substantive section in the Act, providing that the penal provisions with regard to the grant of loans and advances should not apply to book debts, unless the items in question were from the very inception in the nature of loans and advances.

Profit and Loss Account Contents of—

Contents of
the schedule
relating to
the profit
and loss
account
which the
Committee
recom-
mends
(Pages 417—
420 of the
Addendum)

157 With regard to the contents of the profit and loss account, our view, as stated in paragraph 152, has been that the maximum possible information should be given to the investor. We have, therefore, suggested detailed provisions in this behalf in the schedule relating to the contents of the profit and loss account which are largely based on the recommendations of the Institute of Chartered Accountants of India. The present requirements on this subject are not adequate. We have, therefore, recommended that the opening stocks, purchases and sales and closing stocks, selling agency commission and brokerage and discount on sales other than trade discounts should be separately stated. With regard to depreciation, if the provision is not made by means of a depreciation charge, the method of making a provision for depreciation, renewal or diminution in value should be stated. If no provision is made, a statement to that effect should also be made. Particulars in respect of the material amounts set aside to reserves other than provisions made to meet any specific liability should be given, as also particulars of the amounts withdrawn. Similar information has to be given in respect of amounts set aside as provisions for specific liabilities. We have also thought it fit to suggest that particulars in respect of the main headings of expenditure should be given. As we have already noted, profits or losses in respect of transactions of a sort not usually undertaken by the company or accruing otherwise by circumstances of an exceptional or non-recurrent nature will also have to be shown separately in future. Similarly, the amount, if material, by which any of the items shown in the profit and loss account are affected by any change in the basis of accounting, etc., should be stated.

158 According to our recommendations, full details (Pages 418 & 419 of the Addendum) would be required of payments to managing agents in whatever capacity and whatever form. Payments to directors, managing directors or managers have also to be so stated. Similarly, particulars of the aggregate amounts of compensation paid to managing agents, directors or former managing agents or directors will have to be given and these particulars will include the amounts to be paid by the company by other companies and by any other person.

159 If our recommendations regarding the disclosure of information in the balance sheet and profit and loss account are accepted by Government, it will be necessary to make a specific provision in the Act requiring every managing agent including every former managing agent to disclose the amounts received by him in respect of compensation from other parties and there should be a penal provision for non-compliance. Further, in respect of all matters relating to accounts where particulars or information are required to be given, a duty should be cast upon the persons concerned to give the fullest information to the company and to its auditors on pain of a penalty.

Managing agent and other persons to be required to make certain disclosures for purposes of the balance sheet and profit and loss account (Page 304 of the Annexure)

160 We recognise that, in special cases, it may be necessary to modify the above requirements about the matters to be disclosed in the balance sheet and/or the profit and loss account, and have therefore recommended that the Central authority should be empowered, on the application of or with the consent of the company's directors, to vary these requirements appropriately, provided such modification is in the public interest and does not affect the true and fair presentation of the balance sheet or the profit and loss account. It was decided to widen the scope of section 165 of the English Act so as to include the giving of information regarding calculation of managing agents' commission.

Power of the proposed Central Authority to vary the requirements relating to the balance sheet and the profit and loss account (Pages 401 & 402 of the Addendum)

161 In making our recommendations relating to the contents of these documents we have taken into account the complaints made in the past about non-disclosure or inadequate disclosure of essential information in company accounts. We consider that the disclosure of the particulars which we have recommended will reduce the chances of adverse criticism and inspire greater confidence in the minds of shareholders and the general public. If the statutory provisions with regard to accounts are not clearly expressed or require the disclosure of only the minimum particulars, the management of companies would generally provide only the minimum possible information, and the auditors, in spite of their best efforts, would be unable to convince the former of the desirability of disclosing fuller information. If, on the other hand, a standard form of the balance sheet and a schedule of the contents of the profit and loss account are prescribed, the

Form of balance sheet and schedule relating to profit and loss account designed to give the fullest possible information

auditors of companies will have a right to insist on the relevant information being given and thus will be in a better position to safeguard the interests of the investors

Group Accounts

162 We have considered the question of Group Accounts very carefully and are of the view that having regard to the circumstances of this country and our recommendations about the form of presentation of accounts, the provisions in the English Companies Act, 1948, about Group Accounts need not be adopted. Even in England, practical difficulties are being experienced in giving effect to the provisions of the English Act on this subject. Unless uniformity is secured as regards the contents of the various items to be disclosed in the published accounts, the system of Group Accounts is not likely to produce a correct comprehensive picture of the financial position of the group. Apart from this fact, much more information can be obtained from the enclosure of the statutory accounts of the subsidiaries with the accounts of the holding companies as required by the present Act in this country. The system of group accounts is, indeed, so complicated that its introduction in the Indian Companies Act will not result in any advantage, on the contrary, it would only result in the discontinuance of the present practice of attaching the balance sheets and the profit and loss accounts of the subsidiaries to those of the respective holding companies. This, in our opinion, would be a retrograde development. In this connection we would point out that, even under the English Act exemption from the requirement about Group Accounts can be granted by the Board of Trade in the cases mentioned under sub-sections (2) (b) (ii) and (2) (b) (iii) of section 150 of the English Companies Act, and, more generally, this requirement need not apply to cases where it would be impracticable to present such accounts, or where they would not be of any real value to the members of the company in view of the insignificant amounts involved or would involve expense or delay out of proportion to the value to members of the company.

Writing up of Assets

(Page 300
of the
Annexure)

163 It will be seen from our recommendation that we have adopted the provisions of section 56 of the English Act which prohibits the use of premium received on the issue of shares for the distribution of dividends. Likewise we would recommend the prohibition, for such purposes of the utilisation of reserves or surplus created by writing up a company's assets.

Other recommendations relating to the Balance Sheet and the Profit and Loss Account

164 Having elucidated our recommendations as to the contents of the balance sheet form and the profit and loss

account in the foregoing paragraphs, we shall now refer to the more important of our recommendations relating to—

- (a) the preparation and circulation of these documents,
- (b) the special provisions that we suggest in this regard for holding and subsidiary companies, and
- (c) the contents of directors' report

165 The main changes of procedure regarding the preparation and circulation of the balance sheet and the profit and loss account that we recommend relate to—

- (i) the period for which these documents must be prepared and the time-limit for their preparation,
- (ii) the responsibility for the preparation of the balance sheet and the profit and loss account and the manner in which they should be circulated, and
- (iii) the obligation of private companies to file copies of their balance sheets with the Registrar of Joint Stock Companies

166 We recommend that the first balance sheet and profit and loss account of a company should be prepared not later than eighteen months after the incorporation of the company and subsequent balance sheets not later than nine months from the close of the financial year to which they relate. This provision removes the distinction between companies which carry on business wholly in this country and those which do not or have interests outside India. In order to avoid hardship in marginal cases, we suggest that authority should be given to the Registrar to extend by six months the period during which the annual balance sheet and profit and loss account should be laid before the company (*vide* the proposed section 131 in item 22 of the Addendum to the Annexure of our Report).

Limit of time for the preparation of the balance sheet and the profit and loss account (Pages 400 & 401 of the Addendum)

167 We recommend that the balance sheet and profit and loss account should be approved by the board of directors before they are signed on behalf of the directors and submitted to the auditors for their report on them. Although this procedure is implied in section 131 of the present Act, we consider it desirable to place the matter beyond doubt. The responsibility for the preparation of the accounts of a company belongs to the directors, and they must recognise this responsibility by considering the accounts and approving of them before they hand them over to the statutory auditor of the company. We further suggest that no balance sheet or profit and loss account should be issued or circulated unless it has been thus approved and signed by the directors, and that it should not be circulated without annexing to it such documents as may be statutorily required to be so annexed or without a copy of

Responsibility for preparation of the balance sheet and the profit and loss account and the manner in which they should be circulated (Pages 404 & 405 of the Addendum)

the auditor's and the directors' reports. These safeguards are necessary to ensure the authenticity of the accounts and to prevent the shareholders, creditors or the general public from being duped by so-called balance sheets and profit and loss accounts which do not comply with the provisions of the Act (*vide* sub-section (3) of the proposed section 134 in item 22 of the Addendum to the Annexure of our Report)

(Pages 405 &
406 of the
Addendum)

Section 131(3), read with section 135 of the present Act provides that every public limited company shall send a copy of its balance sheet and profit and loss account to every member of the company at least fourteen days before the date of the meeting at which they are to be laid before the members of the company. It also provides that every member of the company shall be entitled to demand a copy of the balance sheet, the profit and loss account and the auditor's report on payment of a fee of six annas for every hundred words or fraction thereof. We have made a few formal changes in these provisions, and have extended the categories of persons entitled to copies of the accounts and reports. The only important recommendation that we make is that a copy of the balance sheet, the profit and loss account and the auditor's report should be circulated, not fourteen but twenty-one days before the date of the meeting at which these documents are to be laid (*vide* the proposed section 135A in item 22 of the Addendum to the Annexure of our Report)

Obligation
of private
companies
to file copies
of balance
sheets with
the Registrar
(Page 407
of the
Addendum)

168 Under the present Indian Companies Act, no private company is required to file its balance sheet or profit and loss account with the Registrar of Joint Stock Companies. We have given this matter careful consideration in the light of the recommendations made by the Cohen Committee and the discussions on this subject in course of the debates in the British Parliament. It is our view that while a private company should, like a public limited company, file its balance sheet along with the auditor's report so far as it relates to the balance sheet, with the Registrar of Joint Stock Companies, it need not file its profit and loss account with him. In this respect our recommendation is similar to that of the Millin Commission in South Africa. Accordingly, we suggest suitable amendments to section 134 of the present Act in our redraft of this section (*vide* sub-section (3) of the proposed section 135B in item 22 of the Addendum to the Annexure of our Report)

Special provisions for the preparation of the Balance Sheet and Profit and Loss Account of holding companies

(Pages 402 &
403 of the
Addendum)

169 Regarding the preparation of the accounts of holding and subsidiary companies, our main recommendations are as follows —

- (1) the time-lag between the close of the financial year of the holding company and that of its subsidiaries should not exceed six months, and to the accounts of the former should be annexed

those of the latter for the whole of their immediately preceding financial years,

- (ii) where the financial years of the subsidiaries do not coincide with that of their holding company, the statements to be attached to the holding company's balance sheet should contain the following information in respect of each of the subsidiaries—
 - (a) whether during this time-lag, there has been any change in the holding company's interest in the subsidiary company, and
 - (b) whether during the same period any material changes have occurred in respect of the fixed assets, investments or loans of the subsidiary or in respect of any borrowings to meet its current liabilities,
- (iii) if the directors of the holding company are unable to obtain the additional information mentioned in (ii) above, they should report this fact in writing in the statement to be annexed to the balance sheet of the holding company,
- (iv) the Central Authority should have the discretionary authority to waive the general requirements about the submission of accounts by the holding company as also the other requirements of the Act, relating to the holding of the annual general meeting of the company and the submission of the annual return by it if, in any particular case, it is necessary that one or other of these steps should be taken in order to enable the financial year of the holding company to coincide with that of its subsidiaries. Similar power has been conferred on the Board of Trade under sub-section (2) of section 153 of the English Companies Act 1948. It is possible to visualise circumstances where the convenience of having the same financial year for the holding company and its subsidiaries may justify the waiver of the related provisions of the Act,
- (v) there is no provision in section 132A of the present Act for disclosing the interest of a holding company in its subsidiary. It is very desirable that a holding company should indicate the extent of its interest in each of its subsidiaries at the close of the subsidiary's immediately preceding financial year. We therefore, recommend that a statement should be attached to the accounts of the holding company to this effect,
- (vi) we have omitted the proviso in the existing section 132A of the Indian Companies Act which exempts investment companies from the operation

of this section as, in our opinion, it is not advisable to grant this exemption to such companies (*vide* the proposed section 133 in item 22 of the Addendum to the Annexure of our Report)

Directors' Report

(Page 405
of the
Addendum)

170 As the Cohen Committee pointed out, most directors' reports are colourless documents, which do little to inform or educate the shareholders. In this respect the American practice differs strikingly from the British, which companies in this country have generally followed. We suggest that the recognised chambers of commerce may, with considerable advantage to their constituents, make a detailed study of the American practice in this regard. It is difficult to make any *a priori* recommendations as to how the directors' reports should be designed and prepared, the matter is one that must be necessarily left to the initiative and judgment of the directors of a company. There is nothing to prevent them from conveying such information as they like to the general body of shareholders. All that we can suggest is that in addition to the information which the directors' report must contain under sub-section (1) of section 131A of the present Act, it should also contain information on all changes which may have taken place in the nature of a company's business or in the business of its subsidiaries or in the class of business in which the company has an interest, whether a member of another company or otherwise, during its financial year, in so far as such information is in the opinion of the directors material to an adequate understanding of the company's affairs by its members and is not harmful to the business of the company or of its subsidiaries (*vide* the proposed section 135 in item 22 of the Addendum to the Annexure of our Report)

Audit and Auditors

(Page 308
of the
Annexure
and
pages 421—
425 of the
Addendum)

171 Sections 144 and 145 of the Act of 1913 deal with auditors, and in the light of the view that we take of auditors' duties and responsibilities they seem to us to be some of its least satisfactory provisions. As in the case of directors, our recommendations relating to auditors are designed not only to secure their independence but also to rehabilitate their position in the management of joint stock companies. Our proposals on this subject are, therefore, mainly concerned with—

- (i) the qualifications of auditors,
- (ii) the appointment, reappointment and removal of auditors,
- (iii) the position of auditors *vis-a-vis* the management and shareholders,
- (iv) the powers and duties of auditors

We have attempted to embody our detailed recommendations on these points in our redraft of sections 144 and 145, which we have set out in item 23 of the Addendum to the Annexure of our Report

Qualifications of Auditors

172 The two basic qualifications of auditors, needed for the purposes of the company law, are (a) that they should be professionally competent, and (b) that in the performance of their duties, they should show integrity and independence of judgment. No law, however well-designed, can ensure these qualities. For, technical competence depends upon training and experience, while the moral calibre of men depends on the traditions of their business, service or profession, and their mental attitude towards such traditions. On these points therefore, section 144 of the present Companies Act says little, and rightly leaves them to be dealt with by the profession itself which has been recently reorganised in this country on all-India basis by the Chartered Accountants Act, 1949. This Act creates an all-India Institute of Chartered Accountants and imposes on the Council of the Institute several important duties connected with the provision of the minimum technical qualification necessary for admission into the accountancy profession, *e.g.*, examination standards, standards in training, etc., and the maintenance of professional standards. A schedule attached to section 22 of the Act enumerates at considerable length the types of conduct which would be deemed to be misconduct within the definition of this section and section 21 lays down the procedure for dealing with enquiries about such misconduct. We are confident that the provisions of this Act and the regulations framed under it will be strictly and wisely enforced. These provisions, coupled with the amendments to section 144 of the Act which we suggest, should go far to raise further the standard of the profession in India (*vide* the proposed section 144 in item 23 of the Addendum to the Annexure of our Report).

(Pages 421 & 422 of the Addendum)

173 Having regard to the importance of ensuring independence of auditors, we further recommend that the following categories of persons should be disqualified from appointment as auditors of a company —

Certain categories of persons to be disqualified from appointment as auditors (Pages 423 & 424 of the Addendum)

- (a) an officer or servant of the company,
- (b) a person who is a partner of or employs an officer or servant of the company,
- (c) a person indebted to the company to an amount exceeding Rs 1 000 or who has guaranteed indebtedness to the company beyond such amount or who since his appointment has become similarly indebted or similarly guarantees indebtedness,
- (d) a person who is a director or member of a private company or a partner of a firm which is a managing agent of the company,
- (e) a person who is a director of any public company which is the managing agent of the company,
- (f) a person who holds shares exceeding 5 per cent in nominal value of the subscribed capital of any public company which is the managing agent of

the company Provided that the shares held as nominee or trustee for any third persons and in which the holder has no beneficial interest should be excluded in computing the percentage of shares held by him

Chartered accountant or partner of his firm to sign auditors report and financial statement of company (Pages 424 & 425 of the Addendum) 174 There is one other recommendation to which we would like to draw attention Although we visualise that a firm can be appointed statutory auditors of a company, in our opinion only a partner of a firm of chartered accountants, or the chartered accountant himself if he practises individually, should be permitted to sign the report and the financial statements of a company This recommendation is designed to prevent the practice which we were told prevails in some parts of this country, for the officers of a firm of chartered accountants to sign the balance sheet on behalf of that firm or on behalf of the individual chartered accountant This practice is clearly objectionable and should, in our view, be stopped (*vide* sub-section (1) of the proposed section 145A in item 23 of the Addendum to the Annexure of our Report)

Appointment, reappointment, removal, etc, of Auditors

(Pages 421 & 422 of the Addendum) 175 Our recommendations on this subject follow closely the provisions of sections 159 and 160 of the English Companies Act, 1948 The general effect of them are as follows —

- (i) It should be the duty of directors to appoint the first auditor of the company to hold office until the first general meeting, but the company may, at the next general meeting, appoint in his place any other person who has been nominated for appointment not less than fourteen days before the date of the meeting In the event of failure to appoint the first auditor, the power to appoint him will vest in the company in general meeting
- (ii) An auditor appointed at a general meeting should ordinarily be reappointed at the next general meeting, unless he is unwilling to continue to serve the company or has become disqualified to act as auditor The shareholders may, however, remove an existing auditor and appoint any other person in his place, provided a *special notice* of a resolution has been given to the company to be moved at the next annual general meeting If the existing auditor has been removed following such a resolution, and no other auditor is appointed to replace him, the fact should be communicated to the Central Authority It will then be open to the latter to appoint a suitable person to fill the vacancy The requirement of a special notice will ensure that no existing auditor is removed from his office without the matter being specifically brought to the notice of the shareholders of a

company and being carefully considered by them. The other provision about authorising the retiring auditor to make a representation in writing or to make a statement before a general meeting, on which we shall comment in the next paragraph, will further strengthen his position.

- (iii) Where a casual vacancy in the office of auditor arises by the resignation of the auditor or auditors, such vacancy should be filled by the company in general meeting (*vide* the proposed section 144 in item 23 of the Addendum to the Annexure of our Report)

We are confident that the above provisions will go far to create confidence among shareholders and to secure the independence of auditors.

Position of Auditors vis-a-vis the management and shareholders

176 As we have already stated, a retiring auditor whom it is proposed to remove must duly receive a copy of the special notice of the appropriate resolution to be moved at the next annual general meeting of the company. He will then have the right to make a representation in writing to the company and to call upon it to circulate his representation to the shareholders of the company. If, for any reason, this representation cannot be so circulated, the auditor shall have the right to require that it should be read out at the general meeting. This right which we propose to confer on the auditor will be, of course, without prejudice to his right to be heard orally at any general meeting of the company. These provisions will, we trust, go far to secure the independence of auditors. It was represented to us that these provisions might not always prove to be adequate in this country, and that as the Millin Commission in South Africa suggested, the Central Authority should have the right to intervene when it was satisfied that an auditor had been unjustly removed from his office. The Millin Commission recommended that in these circumstances, the Minister-in-charge should have the right to appoint a co-auditor. We appreciate the object underlying this recommendation but consider that, in practice, it will be extremely difficult to work this arrangement. The audit of a company's accounts by two auditors—one appointed by the company and the other by Government—is likely to engender friction and misunderstanding and thereby to affect the smooth working of a company. The truth is that there is objection, in principle, to any proposal which directly or indirectly undermines the fundamental position of auditors as agents of the company. This position does not mean that an auditor must be subservient to the company—much less to its management. It only means that an auditor's duty is first and last to the company he serves. After he has submitted his

(Pages 422 &
423 of the
Addendum)

report to the shareholders his duty stands performed. The safeguards that we have now suggested should make the removal of independent and conscientious auditors difficult. For, any attempt by unscrupulous managements to secure their improper removal is bound to give rise to oral or written representations, which in their turn will justify in really bad cases, a detailed investigation into the affairs of the companies concerned (*vide* the proposed section 145 in item 23 of the Addendum to the Annexure of our Report)

auditor's
right to
attend
general
meetings
(pages 422 &
23 of the
Addendum.)

177 We also recommend that an auditor should receive not only the notices and other communications relating to any general meeting, but should also have the right to attend the general meeting and to be heard on any part of the business which concerns him as auditor. Further we suggest that the auditor's report must be read before the general meeting and should be open to inspection by the members (*vide* the proposed section 145B in item 23 of the Addendum to the Annexure of our Report)

Powers and duties of Auditors

178 The auditor's powers and duties relate to two broad groups of subjects which are closely connected with each other, but which for the sake of convenience may be divided as follows —

- (1) powers and duties relating to inspection of the books, accounts and vouchers of the company, and
- (ii) powers and duties relating to the examination of the balance sheet, profit and loss account and the related financial statements of a company

Right of
auditor to
call for
information
from direc-
tors and
officers of
company
(Pages 424 &
425 of the
Addendum)

179 In addition to the right, which the present Act confers on him, to have access at all times to the books, accounts, vouchers, etc., of the company, we consider that he should also have the right to require from the directors and officers of the company such information and explanation, as he, in his absolute discretion, thinks necessary for the performance of his duties. Further, he should have the right to visit at his discretion, any branch office of a company, where the branch accounts are not audited by a duly qualified accountant or a chartered accountant and to have access at all times to the books, accounts, vouchers, etc., which are maintained at that office

We also recommend that it should be the duty of the auditor to state in his report whether he has obtained all the information and explanation which is necessary for the purpose of his audit. This follows as a corollary to the provision in the redraft of section 130 of the present Indian Companies Act, in which we have suggested that the books, accounts and vouchers of the company which are to be kept under this section should be such as would disclose a true and fair view of the affairs of a company (*vide* the proposed section 145B in item 23 of the Addendum)

180 As regards the auditor's powers and duties relating to the audit of the company's accounts, we recommend the adoption of the provisions of the Ninth Schedule to the English Companies Act, 1948. The basic requirement of the provisions of this Schedule is that the audit of a company's accounts should be carried on in such a way that the auditor is in a position to certify that so far as the balance sheet of the company is concerned, it gives a *true and fair view* of the company's affairs as on the date of the closing of the financial year, and, in the case of profit and loss account, of its profit and loss for the financial year. This requirement does not, however, compel the disclosure in the auditor's report of such particulars as are not required to be disclosed by a banking or insurance company under the respective Acts governing them, or as need not be disclosed in the balance sheet and the profit and loss account of any other company, under the revised form of the balance sheet and the schedule of the profit and loss account which we have recommended for adoption. The above exemption is intended to cover those 'hidden' or 'secret' reserves and provisions, which it is not in the interest of the companies, specially of banking and insurance companies, to disclose to the general public. The problems connected with these reserves were discussed at length in paragraph 101 of the Cohen Committee's report and are generally known to students of company finance.

Auditor to
certify that
accounts
give a true
and fair
view of
company's
affairs
(Pages 424 &
425 of the
Addendum)

181 The accounts provisions of the Act which we have recommended make it obligatory for copies of the auditor's and the directors' reports to be attached to the financial statements of a company, before the latter can be filed with the Registrar of Joint Stock Companies or circulated to the members of the company and others. The form in which the auditor's report will be cast under our proposals is indicated by two general statements which every auditor will have to make, *viz*,

Form of
auditor's
report
(Pages 424 &
425 of the
Addendum)

- (a) that he has audited the attached balance sheet and annexed profit and loss account and has obtained all the information and explanation which to the best of his knowledge and belief were necessary for the purpose, and
- (b) that in his opinion and to the best of his information and according to the explanation given to him, the balance sheet and profit and loss account, which are in agreement with the books of accounts give the information required by the Indian Companies Act in the prescribed manner and give a true and fair view in the case of the balance sheet of the nature of the company's affairs as at the end of the financial year, and in the case of the profit and loss account of the profit or loss of the year to that date.

A good deal of discussion has taken place in England as to the advisability or otherwise of the new requirement which calls upon the auditors to present a *true and fair view* as

against the earlier *true and correct* view of the affairs of a company. We have weighed the arguments for and against the presentation of a *true and fair* position as against the *true and correct* position, and have come to the conclusion that a true and fair position be shown. But this presentation should be subject to certain stipulations as provided for in the draft sections in the Addendum to the Annexure of our Report. These stipulations are necessary for meeting technical objections or removing possible mis-conceptions about the phrase *true and fair*.

Recommendations designed to give auditors appropriate position and status 182 It is extremely difficult in any statute to indicate more precisely how the auditors must carry on their duties, in order to arrive at their belief or their opinion in respect of the above matters. That, as we have already seen, will necessarily depend on their technical competence and professional integrity and independence. In these matters, we hope and trust that the Institute of Chartered Accountants will play its proper role. The manner in which the auditors discharge their duties in practice, will greatly influence the management of joint stock companies in future. We reiterate the hope which we have already expressed that the additional safeguards that we have provided in our recommendations relating to the position and status of auditors will enable them and the directors to present their accounts in accordance with the best principles of the accountancy profession and at the same time enable the auditors to bring to the notice of directors and shareholders alike any deviations from those principles. It is only in that way that the provisions of the company law relating to accounts can achieve the objects for which they are designed.

CHAPTER XII

INSPECTION AND INVESTIGATION

Existing law on inspection and investigation of companies

183 The need for the provision of adequate powers in the Companies Act for investigation into the affairs of companies is now so generally recognised that it is unnecessary to elaborate the arguments in favour of it. No law, however well-conceived or well-drafted, can be altogether fool-and-knave proof and it is impossible for any law to protect the fool from the consequences of his acts or omissions. Nevertheless, we consider that it is the function of law to prevent dishonest and unscrupulous people from creating conditions and circumstances, which will enable them to make fools of others. The powers of inspection and investigation into the affairs of a company, which the Companies Acts of most countries confer on Government or a quasi-independent authority are intended primarily as a check on the activities of such people. We recognise that, in some cases, the use of the powers of inspection and investigation may, initially, tend to shake the credit of a company and thereby adversely affect its competitive position, although the allegations against the company may in the end be found to have been largely unfounded. It is, therefore, necessary that the investigation provisions of the Act should be so conceived as to reduce this threat to the credit of companies to a minimum. This risk should not, however, deter us from considering the desirability of conferring adequate powers on an appropriate authority to investigate the affairs of a company, where such investigation is *prima facie* called for. On the contrary we consider it to be in the long-term interest of the trade and industry of this country that such powers should be vested in a competent authority and exercised energetically, albeit with due caution and fairness in all cases which require investigation.

Investigation into affairs of company

It is, however, essential to ensure that the powers of inspection and investigation are not abused, and do not become tools of harassment or oppression in the hands of those who are authorised to exercise these powers. Our recommendation for a statutory Central Authority, functioning outside the arena of party politics, which we elaborate in a later Chapter of our Report will, we hope, ensure the use of these powers in as judicious a manner as possible.

184 One of the few points arising out of the working of the company law, on which we noticed a remarkably large measure of agreement, was the views which the witnesses before us expressed on the subject of inspection and investigation of the affairs of a company. Representatives of the business community and of shareholders and of the general public were all unanimous in their condemnation of the inadequate and perfunctory use that has been

Enforcement of the existing provisions regarding inspections and investigation

so far made of the provisions of the present Act on this subject. Some of them went so far as to argue that, if full use had been made of the powers now conferred on the Registrars of Joint Stock Companies and the Central Government, many of the current abuses in company management might have been either prevented or initially checked. One particular point made by some other witnesses was that, not infrequently considerable delay occurred in obtaining sanction for prosecutions under the Act from State Governments, and generally in obtaining orders in cases arising out of the working of the Indian Companies Act. Thus the Federation of Indian Chambers of Commerce and Industry, in their comments on the Government Memorandum observed

"It is stated in the preamble to this annexure that the present provisions of investigation and inspection have proved dilatory and ineffective and that, therefore, they should be further liberalised. The Committee are of the opinion that even the existing provisions under sections 132 to 141A of the Act have not been adequately utilised by Government in appropriate cases and so there is no validity or force in the reasons stated in the preamble."

The Bengal Chamber of Commerce, in their comments on the Government Memorandum, stated

It seems to the Chamber that the disadvantages referred to in the preamble on the Government of India Memorandum flow not so much from the absence of powers under the present Act as from the dilatoriness of their exercise."

The Registrars of Joint Stock Companies, Bombay, Calcutta and Madras, whom we had the opportunity of examining, partially conceded this charge of under-administration of the Act, but pointed out that the substantive provisions of the Act on this subject were in themselves so inadequate and the procedure laid down in them was so involved that even if the Registrars were able to pursue the proceedings under these sections energetically, they would have been greatly thwarted in their investigations, and, even in cases where gross irregularities had been detected, it would have been far from easy to bring home to the directors and managing agents concerned any charge of the contravention of the provisions of the Act. This does not imply that we are satisfied with the manner in which the powers conferred on Government or on the Registrars under the provisions of the present Act have been exercised or that the administrative machinery necessary for the purpose is adequate. On the contrary, it is our view that the defective working of the provisions of the present Act, inadequate as they are, flows largely from the ineffectiveness of the existing administrative machinery, and in a later Chapter, we shall argue the case for a competent and strong Central

Organisation for the administration of the Indian Companies Act Nevertheless, as a result of our enquiry, we are convinced that the provisions of the law in this regard are also seriously at fault and unless they are suitably revised no strengthening of the administrative machinery in itself, will succeed in achieving the purposes for which these provisions have been made

185 Sections 137 to 143 of the Act of 1913 deal with the Powers of investigation and inspection There is no reason why these powers should be separately dealt with as in the present Act Investigation includes inspection and the provisions under the two heads should be amalgamated under one group of sections The general effect of the present provisions is as shown in the schematic representation given below

At the instance of the registrar (Sec 137)

he registrar may call for additional information from a company where he is of opinion that this is necessary in respect of any document which the company is required to submit to him [section 137 (1)], where the information is not submitted to him or he is of opinion that the document in question discloses an unsatisfactory state of affairs, or (2) that a document does not disclose a full and true statement of the matter to which it reports to relate, the registrar shall report the facts to Government [Sec 137]

Where any shareholder or creditor represents to the registrar that a company is carrying on its business (1) in fraud of its creditors, or (2) in fraud of persons dealing with the company or (3) for a fraudulent purpose, the registrar may report to Government [Sec 137 (6)]

Government may consider investigation into the affairs of a company on the application of a specified percentage of the members of a company (that is, members holding not less than one-tenth of the shares issued or one-fifth in number of registered members in the case of a company having no share capital) Sec 138 (1) and (2)

Inspectors may be appointed by a company by a special resolution to investigate its affairs [Sec 142 (1)]

On receipt of such application, Government may ask the applicants (a) to produce *prima facie* evidence in support of their complaint and to prove that they are not actuated by malicious motives and (b) also to give security for payment of the costs of the enquiry (Sec 139)

Inspectors shall submit their final report in such manner and to such persons as the company in general meeting may direct [Sec 142 (2)]

If on perusal of the registrar's report or the application of the requisite number of shareholders, Government are satisfied that a case for inspection has been made out, Government may appoint inspectors (Sec 138)

Inspectors shall submit their final report to Government (Sec 141)

If the inspector's report discloses a criminal offence, Government shall refer the matter to the Advocate General or the Public Prosecutor [Sec 141A (1)] Otherwise, copies of the inspector's report would be sent to the registrar and the company [Sec 141 (1)]

If the Advocate General recommends prosecution, proceedings would be instituted [Sec 141 A (2)]

186 It will be seen that under the present law, the Registrar of Joint Stock Companies has powers to report a case concerning the affairs of a company only—

Existing powers of registrar to report on a company's affairs

- (1) where he has called for some additional information or explanation which he considers necessary for the purpose of elucidation of any document, which a company is required to submit to him under the Act, and he has either been refused the additional information or explanation or he is of opinion that (a) the documents in question disclose an unsatisfactory state of affairs, or (b) that it does not disclose a full and fair statement of the matter to which it purports to relate,
- (2) where the Registrar receives a representation either from any member or creditor of a company alleging that its business is being carried on (a) in fraud of its creditors, (b) in fraud of any other persons dealing with the company, or (c) for a fraudulent purpose

In the first case, the Registrar has to give the company an opportunity to furnish, in writing, such additional information and explanation which he may require, and in the latter case he has to give the parties concerned an opportunity of being heard, and then call upon them in writing to submit such information or explanation as he may require in order to enable him to arrive at a finding on the representation, which he may have received from any member or creditor of the company. It may also be noted that in the latter case, the Registrar's enquiry is strictly limited to allegations of fraud. He has no power to enquire into allegations of irregularities, however serious, unless they amount to fraud.

The next stage in the proceedings is for Government to take action on the Registrar's report. Section 139 requires that Government may appoint one or more competent inspectors to investigate the case and to report on it in such manner as they may direct. Further effective action on the inspector's report would depend on the nature of the facts disclosed in it. If this report discloses a criminal offence, section 141A of the Act requires that Government should refer the matter to the Advocate General or to a Public Prosecutor, and if the latter recommends prosecution, then criminal proceedings can be instituted against the persons concerned. If, however, the inspector's report does not disclose any such offence, all that Government need do is to forward one copy of the report to the Registrar and another to the company—presumably only for the information of the Registrar and for such action as the company may like to take against the persons found to have been at fault under the civil law.

Share holders' right to apply to Government to appoint inspector

187 Apart from the Registrar, a number of shareholders of a company other than a banking company, holding not less than 1/10th of the shares issued or, where a company has no share capital, 1/5th in number of the registered members of a company, has also the right under section 138 of the Act to approach Government independently and to apply to them for the appointment of inspectors. In such cases, section 139 requires that such application should be supported by such evidence as Government may require showing that the applicants have good reasons for asking for the investigation and are not actuated by malicious motives, in suitable cases Government are also empowered to require the applicants to provide security for payment of the costs of the enquiry. Section 141 further provides that all expenses of and incidental to the investigation carried out by inspectors in such cases, should be defrayed by the applicants unless Government direct the same to be paid by the company.

A critique of the existing position

188 It will be seen from the above commentary on the existing provisions of the Act that the powers of the Registrar to make a report to Government in a matter relating to the affairs of a company are confined to the circumstances mentioned in paragraph 186 above, and the manner in which these powers can be exercised is regulated by the elaborate procedure laid down in section 137. Further, the Registrar has no means of compelling the production of the additional information or explanation that he may require, except to apply to the Court, and it is left to the Court to decide whether such additional information or explanation may reasonably be required by the Registrar for the purposes of his investigation, and then to allow him such information subject to such terms and conditions as the Court may think fit to impose. If the information or explanation is not furnished within the specified time or if after perusal of such information, the Registrar considers that the state of affairs as disclosed is unsatisfactory, he has to make a report to Government whereupon they may if they think fit so to do, appoint an inspector. This procedure causes delay and is unnecessarily involved.

Similarly, in regard to the right of a percentage of shareholders or members of a company to apply to Government for the appointment of inspectors, it will be noticed that they will have to produce *prima facie* evidence to show not merely that they have good reasons for asking for investigation, but also that they are not actuated by malicious motives. In a well-known case, the applicants were called upon to deposit a heavy sum by way of security and were further required to give an undertaking for an unlimited amount which caused much inconvenience to them. The investigation report disclosed a serious state of affairs calling for special legislation for the management of the company.

With regard to the condition as to the holding of 1/10th of the shares issued, it operates to the disadvantage of the shareholders, particularly in the case of large companies where there may be general grievance against the management of the company but it may nevertheless be an extremely difficult practice to obtain the agreement of the holders of 10 per cent of the shares because there are many hundreds of them scattered all over the country. Even where by prodigious effort this is done, the company might contest the validity of the application on the ground that there was no proof that all those shares were still held by persons who were applicants and so in actual practice, it may be very difficult to proceed unless the percentage is considerably higher than 10%. Further, the system of holding shares in the names of banks adds to the shareholders' difficulties in tracing the real owners and obtaining their signatures to the application. In these circumstances, it is not surprising that those who have had experience of the administration of the provisions of sections 137 to 142 of the present Act are inclined to consider them inadequate and needlessly involved.

189 These defects and deficiencies in the present law have been further aggravated by the shortcomings in the organisation for the administration of the Indian Companies Act. In most parts of India, the powers of inspection and investigation have been delegated to the State Governments, which have no separate administrative machinery to deal with this subject. The offices of the Registrars are inadequately staffed both in quality and quantity, while the volume of miscellaneous work that is entrusted to the Registrars both by the Central and the State Governments leave them hardly any time for such detailed investigation as would be necessary, in any case, under sections 137 to 142 of the Act, if any effective use is to be made of these provisions. We shall deal with the problems of organisation and administration in a later Part of this Report. In this Chapter we confine ourselves only to such changes in law as are necessary for the achievement of the objects underlying the provisions about inspection and investigation in the Act.

Defects in
the present
position

Proposed changes in law

190 In course of our enquiry, we took the opportunity of discussing the provisions of the English Act of 1948, as embodied in sections 164 to 171, with the witnesses who appeared before us. The consensus of opinion was strongly in favour of the adoption of these sections, with necessary modifications to suit Indian conditions. The only important issue, on which some divergence of views was noticeable, was in regard to the provisions contained in clause (b) of section 165 of the English Companies Act, 1948, relating to the powers of the Board of Trade to initiate investigation into the affairs of a company *suo moto*. Many witnesses expressed the fear that in this country where we did not have a well-established organisation like the Board of

Adoption
of the
provisions
sections 164
to 171 of the
English Act
with suitable
modifications
(Pages 304
308 of the
Annexure)

Trade, with knowledge and experience of the working of joint stock companies, such powers as those conferred on the Board of Trade might be a source of annoyance or harassment to honest and *bona fide* businessmen. We are not unmindful of this risk, but it is our belief that if our recommendation regarding the proposed Central Authority is accepted by Government, it should not be difficult in course of a few years, to build up a competent organisation, which should be able to deal effectively with all such matters under the Companies Act as are now handled by the Board of Trade in the United Kingdom. In any case, we do not consider this limitation in our administrative system to be either so serious or intractable as to deter us from recommending the adoption of the wholesome provisions of the English Companies Act on this subject almost in *toto*. Our recommendations are, therefore, broadly as follows —

- (i) first, the powers now given to the Board of Trade and the authority to be exercised by it under sections 164 to 171 should, in this country, be exercised by the Central Authority that we propose,
- (ii) secondly, the power given to an inspector to investigate the affairs of a company, under section 166 of the English Act, should, in this country, also extend to the investigation of the affairs of the related managing agency company or companies so far as may be necessary for the purposes of the investigation into the affairs of the managed companies. Under this section of the English Act, the investigation by an inspector is not limited to the company whose affairs he is appointed to investigate but may extend to the affairs of any other company, which is or was at any relevant time a member of the same group, and an inspector's report must also contain the results of investigation into such associate companies, in so far as it is relevant to the main investigation. It is obvious that in the circumstances of this country, the affairs of the managing agency company will often be very closely related to those of the managed companies. For example, it may become necessary to find out whether the managing agency company is acting in contravention of the provisions of section 87H. This is the justification for our recommendation,
- (iii) thirdly, for similar reasons, the word 'officers', in section 167 of the English Act, should be elaborated by a suitable explanation to be attached to the corresponding section of the Indian Act to include directors and partners of the managing agent of a company, where the managing agent is a company or a firm, as the case may be. It

will be noticed that the duty of officers and agents as laid down in section 167 of the English Act is not only to produce the necessary books and documents but also to give the inspectors all other reasonable assistance in their investigation. It is obvious that in a company, managed by a managing agent, an inspector's work will be seriously hampered if he cannot call upon the managing agent to give him similar assistance,

- (iv) fourthly, the power to proceed on the inspector's report (given to the Board of Trade by section 169 of the English Companies Act) should be made clearly applicable to the managing agent of a company, the partners of such managing agent in the case of a firm, or the directors and officers thereof where the managing agent is a company. Under this section of the English Act, on receipt of a report from the inspector, it is open to the Board of Trade—
- (a) to refer the matter to the Director of Prosecutions and on his advice institute criminal proceedings against the persons concerned, or
 - (b) to bring any proceedings for recovery of damages in respect of fraud, misfeasance or other misconduct in connection with the promotion, formation or management of a company, or
 - (c) to bring any proceedings for the recovery of any property of the company, which may have been disclosed in the inspector's report to have been misapplied or wrongfully detained, or
 - (d) to present a petition for the winding up of the company, if from the inspector's report, it appears that it is just and equitable to do so or for any other order which the Court may think fit to pass under section 210 of the English Act

Our recommendation on this point is that, in addition to these reliefs which may be available to a company, a further relief should be available against the managing agent, when there are good grounds for proceeding against him

191 There is another recommendation which we make in this context and which in our view will go far to facilitate the investigation of offences against the Companies Act. It has been brought to our notice that in many cases the successful prosecution of offences under the Indian Companies Act is hindered by the fact, that material information relating to certain matters which are within the knowledge or in the possession of accused persons is not available to the Court, because under the existing law the accused is not a competent witness. The considerations

Person
accused of
any offence
under the
Act to be a
competent
witness in
proceedings
relating to
such offence
in a Court of
law
(Page 308 of
the Annexure)

on the basis of which, under the existing law, an accused person is debarred from being called as a witness do not in our view apply to offences against the Indian Companies Act. We, therefore, recommend that section 342 of the Criminal Procedure Code should be suitably amended, so that a person accused of any offence under the Indian Companies Act may become a competent witness in the proceedings relating to such offence in a Court of law. In that case, if an accused person does not put in his appearance as a witness in a proceeding in which he is concerned, it will be competent for the Court to take this fact as a circumstance, which along with the other circumstances of the case, the Court can take into account in arriving at its finding, and if any such person does appear before the Court as a witness he will be liable for any false statement that he may make as any other witness appearing before the Court.

Schematic
representa-
tion of the
above re-
commenda-
tion
(Pages 304—
308 of the
Annexure)

192 The broad effect of our recommendation for the adoption of the provisions of sections 164 to 171 of the English Act, with the changes we have suggested above to adjust them to Indian conditions, will be seen at a glance from the following schematic representation

Investigation (on the lines of sections 164-171 of the English Companies Act, 1948)

At the instance of the Central Authority (Cf sec 165 (b) of the English Act) | At the instance of the members of a company [Cf sec 164 and 165 (a) of the English Act]

The Authority may of its own motion, appoint inspectors where there are circumstances suggesting—
 (i) that the business of a company is being conducted (a) with intent to defraud its creditors or the creditors of any other person, or
 (b) otherwise for a fraudulent and unlawful purpose, or
 (c) in a manner oppressive to any part of its members, or
 (d) for any fraudulent or unlawful purpose,
 (ii) that persons connected with the formation or management of a company have been guilty of fraud, misfeasance or other misconduct towards the company or its members, or
 (iii) that its members have not been given all information with respect to its affairs which they might reasonably expect

The Authority shall appoint inspectors where (i) the company wants investigation by a special resolution, or (ii) the Court orders investigation

The Authority may appoint investigators in other cases on the application of (a) not less than two hundred members or members holding not less than one tenth of the shares, or (ii) where the company has no share capital, not less than one-fifth in number of members

The inspectors may submit *interim* reports, if the Authority so desires and shall submit final reports at the conclusion of their investigation (Cf sec 168 (1) of the English Act)

On receipt of the inspector's report, the Authority may take action as follows (Cf sec 169 of the English Act)

- (i) if any *prima facie* offence has been disclosed, it shall consult the Advocate General or the Public Prosecutor, and on his advice institute criminal proceedings,
- (ii) if the facts disclose fraud, fraudulent or unlawful purpose or oppression to a minority of shareholders or misfeasance or misconduct in course of the formation or mismanagement of a company, the Authority may, if it considers it expedient to do so, present a petition for the winding up of the company,
- (iii) if the authority is satisfied that it should itself initiate action in the public interest, it may take steps to recover the damages in respect of any fraud, misfeasance or other misconduct that may have been committed in connection with the promotion or formation of any body corporate or the management of its affairs or to recover any property which may have been misapplied or wrongfully retained

Likely
increase
in number
of investiga-
tions conse-
quent on
acceptance
of proposals
(Pages 304—
308 of the
Annexure)

193 We desire to state that as a result of our enquiry we were informed that since the passing of the English Companies Act, 1948, the number of applications for investigation and the number of cases in which investigations were ordered had shown a progressive increase in the United Kingdom so much so that there were twice as many inspections under the new Act as there were during the currency of the 1929 Act. It would not be surprising if a similar tendency manifested itself in this country if our recommendations were accepted.

Initiative in
matters of
investigation
to rest with
Central
Authority
(Pages 304—
308 of the
Annexure)

194 Some witnesses suggested that all cases, where it was *prima facie* desirable to order investigation, should in the first instance, be referred to a Standing Advisory Committee and that the opinion of this Committee should be obtained before the orders of investigation were passed. We see great difficulty in giving effect to this suggestion and doubt if any committee which was representative of different interests in trade and industry would be able to offer any clear-cut advice in such cases, on which Government could take action. We feel that the initiative in this matter should rest with the Authority which will be in over-all charge of the administration of the Indian Companies Act. This Authority will no doubt hear the parties concerned and examine all aspects of a case before it orders investigation into it.

Investigation of ownership of shares

Real owner-
ship of
shares
(Pages 304—
308 of the
Annexure)

195 While we are on the subject of investigation of the affairs of a company, we should like to refer to one particular class of investigation, the importance of which has only recently come to be recognised in this country. We refer to the question of investigation of the real ownership of shares, a subject which figured so prominently in the Cohen Committee's enquiry in England. In paragraph 78 of its report, the Cohen Committee quoted some representative figures supplied to them by the Committee of London Clearing Bankers, and on the basis of an analysis prepared by one of the clearing banks, with a total of 72,456 individual holdings of debentures and/or shares in companies, came to the conclusion that shares were held in the books of the companies in the names of persons other than beneficiaries for a variety of reasons, the most important of which was the convenience of holding the shares in this form as executors and trustees under wills and settlements. In this country also, the practice of purchasing shares in the names of banks is fairly common. Since the end of World War II, the practice has received a strong fillip from motives, which are not always praiseworthy or blameless. In particular, the practice of holding shares on blank transfers has come in for a good deal of legitimate criticism for reasons, into which we need not enter in this context. Although we discussed this subject with many of our witnesses, and the memoranda submitted to us by several representative bodies, commented at length on this problem, we do not express any views on this subject, as it

has recently been considered at great length by the Committee on Proposed Legislation for the regulation of Stock Exchanges and Contracts in Securities. This Committee has already submitted its report to Government which we understand is under their consideration.

196 On the wider subject of nominee holding of shares, the Cohen Committee made three proposals, viz ,

- (i) that the registered owners of shares should be made to declare whether they were the beneficial owners of these shares or not,
- (ii) that an obligation should be imposed on every person, who was directly or indirectly a beneficial owner, to file a declaration with the company to that effect, and thereafter a declaration of any change in his beneficial interest from time to time,
- (iii) that the Board of Trade should be given the power to investigate the beneficial ownership of any shares, if, in a particular case, it considered it necessary to do so in the public interest

In course of the debate in the British Parliament on the Amendment Bill of 1947, these proposals met with strong criticism and in the end the first two proposals were abandoned and reliance was placed almost exclusively on the third proposal, namely, investigation by the Board of Trade, if and when it considered it necessary to undertake such an investigation. For this purpose, the powers of the Board of Trade were considerably enlarged. These powers have since been embodied in sections 172 to 175 of the English Act of 1948.

197 A few witnesses were of the view that whatever might be the justification for nominee holdings of shares and whatever might have been the recommendation on this point of the Cohen Committee in England, in the circumstances of this country, where such holdings lend themselves much more easily to use for anti-social purposes, the persons who are now able to conceal their identity behind their nominees should receive no encouragement from the State to hold their shares in this form. These witnesses, therefore, pressed for the abolition of the system of the nominee holding of shares by the simple expedient of making it illegal, so that beneficial owners could not enforce their right against the registered owners of shares. We regret we are unable to accept this suggestion. In our view, any such proposal would gravely dislocate trade and business without conferring any counter-balancing advantage. We reiterate the view expressed by the Cohen Committee and endorsed by the Millin Commission in South Africa, that in a large number of cases such holdings are harmless and serve legitimate and necessary business purposes. It will be extremely difficult to provide for these purposes by way of exemption. A more practicable measure of reform would be to ensure that the

Nominee holding of shares (Pages 304—308 of the Annexure).

Proposals for the future (Pages 304—308 of the Annexure)

State to enquire into the ownership of such holdings, if and when circumstances require such investigation. We, therefore, recommend the incorporation in the Indian Act of provisions similar to those contained in sections 172 to 175 of the English Companies Act, 1948, with such adjustments as may be necessary to suit them to the circumstances of this country. In particular, the power given in sub-section (3) of section 172 of the English Act to the shareholders of a company should, in our view, extend to the investigation of the ownership of shares in the related managing agency company. We would further suggest that, where under our recommendations any question arises as to whether any person or concern is an "associate" of an existing managing agent, the same prescribed number of shareholders as are entitled to make a complaint against a company should also be entitled to complain that the particular concern is an "associate" of the existing managing agent and that the provisions of the Act are thereby being contravened. Any one of the shareholders, making such a complaint to the Central Authority, should be under an obligation to make an affidavit to the effect that a particular person or concern, against whom the complaint is made, is an "associate" of the managing agent. On receipt of such a complaint the Central Authority should call upon the party alleged to be an "associate" to make an affidavit stating that it is not so, and when such an affidavit has been filed, the Central Authority should take such further action as it considers necessary. In order to prevent the submission of frivolous or vexatious applications under sub-section (3) of section 172 of the English Companies Act, we suggest that in the circumstances of the country it would be expedient to empower the Central Authority to demand a deposit not exceeding Rs 1,000 before an application under this section can be entertained and that where on investigation the Central Authority is satisfied that the application is frivolous or vexatious it can recover the cost of the investigation not exceeding Rs 5,000 inclusive of the amount of the deposit which may be forfeited.

Section 173 of the English Act authorises the Board of Trade to undertake the investigation of the ownership of shares or debentures in a company, where the appointment of an inspector would be a cumbrous or needlessly expensive proceeding, while section 174 authorises the Board of Trade to impose necessary sanctions if they or the inspector encounter any obstructions in course of any investigation under these sections. The sanctions can take various forms, *e.g.*,

- (a) a ban on the transfer of shares or debentures,
- (b) a declaration by the Board of Trade that any transfer of shares during the period of the ban would be void,
- (c) prohibition of the exercise of voting rights in respect of such shares

- (d) prohibition of the issue of any further shares in lieu of these shares,
- (e) prohibition of any payment by the company in respect of these shares or debentures except in the case of liquidation

The restrictions set out above are of a temporary nature in that they can remain in force only till the relevant facts have been found out on investigation. Even then, a remedy has been provided by sub-section (3) of section 174 of the English Act. Under this sub-section, it is open to an aggrieved party to apply to Court for relief against these restrictions and the Court has been empowered to direct that the shares shall cease to be subject to these restrictions. In view of this, we consider that the objections raised by certain witnesses against the above restrictions are not valid.

Minority interests and the Court's powers in case of oppression by majority or gross mismanagement

198 It will be convenient if, at this stage, we dispose of another cognate issue. Where the affairs of a company are mismanaged, such mismanagement may disclose—

- (a) a criminal offence on the part of the management,
- (b) a cause for civil action for damages or recovery of moneys misapplied or misused, or
- (c) a cause for winding-up

Oppression of minority and gross mismanagement (Pages 310 and 311 of the Annexure)

We have attempted to indicate in the foregoing paragraphs, which of the above remedies can be availed of by the shareholders and which by Government or the Central Authority, and the circumstances in which they would be applicable. It is, however, possible to visualise circumstances in which the affairs of a company are carried on in a manner, which does not justify the application of any of the above remedies, but is, nevertheless, oppressive to a section of the shareholders or prejudicial to the interests of the company.

199 One of the major issues before the Cohen Committee was, how to devise more effective means than were available under the then existing law, for the protection of the minority shareholders against the "oppression" of the majority. Under the company law of England, as it existed before the enactment of the Companies Act of 1948, the only effective remedy against oppression of which the minority shareholders could avail themselves, if they succeeded in proving their case, was a winding-up order under the "just and equitable" clause of section 168 of the English Companies Act of 1929 [Cf our section 162(5)]. The remedy was, however, very often worse than the disease. For, in practice, it generally meant that the business of the company in liquidation would have passed into

Safeguards against oppression or mismanagement (Pages 310 and 311 of the Annexure and pages 426-31 of the Addendum)

the hands of the majority of shareholders who would ordinarily be the only available purchasers of such a business. As a result of winding-up proceedings, all that would, therefore, happen would be that the business would be taken over by the majority against whose conduct the minority had sought to obtain redress, without the latter being compensated in any way for their interest in it. Further, the rule of law, under which the Courts administered the provisions of section 168 of the English Companies Act, 1929, generally precluded the making of a winding-up order in cases where an alternative remedy was available. Hence, although oppression to minority shareholders might duly constitute a ground for such an order under the "just and equitable" clause, in practice, the minority very often were prevented from benefiting by the provision of this section. The Cohen Committee discussed this subject at considerable length on pages 30 and 95 of its report and made two recommendations

- (i) that the relief under the "just and equitable" clause should be available to the members of a company, even if an alternative remedy was available, unless the Court was of opinion that the petitioners were acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy. This recommendation has been embodied in sub-section (2) of section 225 of the English Companies Act, 1948. We shall have occasion to refer to it again in Chapter XIII of our Report, where we deal with the provisions of the Act of 1948 relating to winding up,
- (ii) the other recommendation of the Cohen Committee has since been embodied in the well-known section 210 of the English Companies Act. Under this section, if the Court is of opinion that the winding-up of a company would unfairly prejudice a part of the members, but otherwise the facts would justify the making of such an order, the Court may make any order it thinks fit, with a view to bringing to an end the matters complained of. The discretion given to the Court under this section of the English Act is very wide and far-reaching. For example, the Court may pass any order regulating the conduct of the company's affairs in the future, and provide for the purchase of the shares of any member by the other members of the company and also, contrary to the existing rules of company law, authorise the purchase of a member's shares by the company. The Court may also make alterations and additions to the company's memorandum or articles, and if it does so, then notwithstanding anything in the Act, the company will be debarred from making

any further alteration or addition inconsistent with the Court's order. These are only illustrative of the powers which the Court can exercise under this section. Briefly, the Court may impose upon the parties concerned whatever settlement it considers a fair and reasonable solution of the difficulty, and its discretion in seeking and applying the terms of settlement is unfettered.

We have carefully examined the scope of this section and consider that not only can it be suitably adapted to the circumstances of this country, but its scope may be appropriately enlarged to cover not only the cases of oppression to a minority of shareholders, but also of gross mismanagement of the affairs of a company which cannot be otherwise suitably dealt with under the other provisions of the Act. We accordingly recommend the enactment of two sections

- (i) to provide for a remedy for the oppression of minorities on the lines of section 210 of the English Act, 1948, and
- (ii) to provide for a remedy in cases of mismanagement of a company's affairs in a manner prejudicial to the interests of the company

200 It will be noticed from the drafts of these two sections which we have prepared (*vide* items 24 and 25 of the Addendum to the Annexure of our Report) that we have departed in some important particulars from the provisions of section 210 on which our recommendations are essentially based. In the first place, we have provided that any material change in the control of a company may be deemed by the Court to constitute a fact, which would justify the grant of an alternative remedy instead of winding-up in a case of oppression, and also where, in the opinion of the Court by reason of such a change in the management or by reason of gross mismanagement the interests of the company have been or are likely to be prejudiced, the Court may make an order determining any agreement howsoever constituted between the company and the managing agent

Departure from relevant provisions of the English Act (Pages 310 and 311 of the Annexure and pages 426—431 of the Addendum)

Secondly, we suggest that the provisions of sections 235 and 236 of the Indian Companies Act, 1913, which empower the Court to assess damages against delinquent directors, managers, officers and others and to punish them for falsification of a company's books, should apply to proceedings under these sections. As a corollary to this recommendation, we further suggest that if in any proceeding under these new sections that we propose, the Court passes an order terminating the agreement between a company and its managing agent, the latter or any of his associates as defined by us should not be eligible for appointment or reappointment as managing agent or manager of that

company for a period of five years except with the leave of the Court. We have attempted to draft a separate section incorporating this recommendation (*vide* item 26 of the Addendum to the Annexure of our Report)

Thirdly, we recommend that the Court should have the power to make an *interim* order pending the making of a final order on a petition under either of the sections referred to earlier. The English law contains no provision for such an interim order, because we understand that petitions normally come up before the Courts in Great Britain within three weeks after they have been lodged. Conditions in this country are different, and we have considered it useful to provide for *interim* orders.

Fourthly, we recommend that the power to present petitions to the Court, which is given to a single shareholder under section 210 of the English Act, should, in the circumstances of this country, be given to a specified number or percentage of shareholders, ordinarily not less than fifty in number or those holding not less than one-tenth of the issued share capital of a company on which calls and other sums due have been paid or not less than one-fifth in number of members in case of companies not having a share capital. We consider these provisions necessary to discourage the presentation of frivolous petitions by one or more disgruntled shareholders. The difference between the prescribed members competent to commence proceedings under the proposed sections is justified by the nature of the relief provided.

Ineligibility of managing agents to act as such in certain circumstances (Pages 310 and 311 of the Annexure and pages 426—431 of the Addendum)

201 We have already referred to the disqualifications which we suggest should be imposed on the managing agent of a company whose agreement is being terminated by an order of the Court under the provisions of the new sections which we recommend. It will be noticed that the proposed disqualification, namely, the ineligibility for appointment or reappointment of a managing agent or manager of the company concerned for a period of five years except with the leave of the Court is very similar to the disqualification imposed on the director, manager or other officer of the company convicted of a penal offence under section 141A of the Indian Companies Act. The important difference is that whereas in the latter case, the persons concerned are prohibited from being connected with or taking part in the management of any company for a period of five years from the date of their conviction, in the present case, we limit the disqualification only to their appointment or reappointment or their right to act as managing agent or manager of the same company for a period of five years. We further provide that in such a case, the leave of the Court should not be given unless the proposed Central Authority has been notified of the intention of the party or parties concerned to apply for such leave and has had an opportunity of considering whether such application should be opposed in public interest or not.

202 Before we leave this subject, we should like to draw attention to the provisions of section 153C and 153D of the Indian Companies Act, which were inserted by the Indian Companies (Amendment) Act, 1951. In paragraph 24 of our Report, we have already stated that we had an opportunity of considering the provisions of the original Ordinance, which was subsequently replaced by the Amendment Act of 1951 and expressing our views on it. It may not be out of place to mention here that the provisions of sections 153C and 153D of the Indian Companies Act as originally set out in the Ordinance were so closely in line with the tentative proposals formulated by our Subcommittee that, when we met to consider the reference from Government asking for our views, we had no difficulty in approving of the provisions of these sections, with some minor amendments, which we communicated to Government at that time. The Amendment Act of 1951, however, has in some important particulars gone beyond the provisions contained in the Ordinance and the recommendations that we make in the preceding paragraphs. But in one important respect it is more restrictive than the draft sections 153C and 153D proposed by us, in that under our proposals we do not contemplate that shareholders who complain that the affairs of their company are being managed in a manner prejudicial to the interests of the company should be required also to prove that the facts disclose such a state of affairs as would justify the making of a winding-up order. We do not feel called upon to make any detailed comments on the other provisions of the Indian Companies (Amendment) Act, 1951, but have no doubt that should Government decide to accept our recommendations which cover the whole field of company law, they will, in due course, review the provisions contained in this Act.

Desirability of reviewing certain provisions of the Amendment Act of 1951 relating to complaints against management of company (Pages 310 & 311 of the Annexure and pages 426-431 of the Addendum)

Safeguard against frivolous or vexatious prosecutions under the Act

203 One point that was emphasised on us again and again by the representatives of trade and industry was that the investigation provisions of the Act should not give a handle to unscrupulous shareholders to serve their personal ends and to harass the management of a company and thereby to bring its affairs into disrepute. It will be noticed that in the recommendations that we have made in the foregoing paragraphs, we have taken care to bear this aspect of the question in mind. Further, in order to eliminate possibilities of vexatious criminal proceedings, we recommend that section 278 of the Indian Companies Act should be suitably amended to penalise frivolous or vexatious complaints. We have accordingly attempted a redraft of this section (*vide* item 28 of the Addendum to the Annexure of our Report). Our specific recommendations are that—

(Page 335 of the Annexure and pages 441 & 442 of the Addendum.)

- (1) no prosecution should lie against any company
or against any officer for any offence

Indian Companies Act, other than an offence under section 237 except on a complaint in writing of the Registrar or of a shareholder of the company or of the Central Authority. This provision will not, however, apply to any action taken by the liquidator of a company in connection with any offence committed in respect of any of the matters included in Part VI of the Act,

- (2) if in any case instituted on the complaint of a shareholder, the trying magistrate is of opinion that the complaint is frivolous or vexatious, he may call upon the complainant to show cause why he should not pay compensation to the persons complained against. For this purpose, the provisions of section 250 of the Criminal Procedure Code should apply,
- (3) even if a person who makes a frivolous or vexatious complaint is directed to pay compensation, this fact should not exempt him from any civil or criminal liability, which he may incur under the ordinary law,
- (4) there should be a right of appeal against any order directing a person to pay compensation under the proposals we make

We trust that the tightening up of these penal provisions, coupled with the positive provisions of the Act under its investigation sections, which we have suggested, will greatly reduce the chances of malicious prosecution of any director, managing agent, manager or other officer of a company

CHAPTER XIII

WINDING UP

[Part V of the Act of 1913]

204 The Indian Companies (Amendment) Act, 1936, made several extensive changes in the substantive provisions of the Act relating to winding up. The more important of these amendments related to —

Amend-
ments made
by the Act
of 1936
relating to
winding up

- (i) the recognition of the distinction between the voluntary winding-up of solvent and insolvent companies which had been already recognised in the English Companies Act of 1929. Sections 208 to 208E inserted by the Amendment Act of 1936 provided for the first type of winding up and was called members' voluntary winding up, while sections 209 to 209H provided for the latter type and was called creditors' voluntary winding up. The former type of winding up was to be preceded by a declaration of insolvency as in section 207 inserted by the Amendment Act,
- (ii) the appointment of a *provisional* liquidator, in order to take charge of and deal with the assets of a company, at any time between the presentation of a petition for winding up and the appointment of an official liquidator,
- (iii) the automatic stay of suits or other proceedings against the company except with the leave of the Court in cases where provisional liquidators were appointed,
- (iv) the obligation on directors, secretaries or managers of a company to submit to the official liquidator a comprehensive statement of its assets and liabilities within a fixed time after the winding up order had been passed,
- (v) the submission by the official liquidator of periodical and regular statements to the Court as to the affairs of the company in liquidation,
- (vi) the appointment of committees of inspection, with the object of supervising and assisting the official liquidator in the discharge of his duties, and incidentally facilitating the exercise by the creditors and the contributories through their representatives of a larger measure of control over winding up proceedings than they possessed under the old Act,
- (vii) the submission of regular accounts by the official liquidator and the audit of such accounts by the Court,

- viii) the conferment of powers on the official liquidator to disclose burdensome assets and to disclose onerous property as in the case of trustees in bankruptcy,
- (ix) the amendment of the then existing provision for the prosecution of persons found guilty of misfeasance in course of winding up proceedings in order to facilitate such prosecution.
- (x) the statutory recognition in section 238A of a series of new offences committed by persons connected with the management of a company in liquidation, either before or in course of winding up

Committee's
recommendations
regarding
winding-up
mainly
procedural
(Pages 313
326 of the
Annexure)

205 Unlike these amendments, our recommendations on the provisions in this Part of the Act are largely procedural, being generally concerned with the clarification of legal issues that have arisen in the conduct of liquidation proceedings. Some of the amendments that we suggest are, however, designed to strengthen the existing provisions regarding the enforcement of contributories' liability, and against abuse of the processes of the law, with a view to defeating the objects of liquidation. In the Annexure to our Report we have listed the amendments that we suggest. In this Chapter we shall comment only on the more important of them which we wish to bring to the notice of the general public.

Liability of a contributory

(Page 313
of the
Annexure)

206 Section 159 of the Act of 1913 states that the liability of a contributory shall create a debt, payable at the time specified in the calls made on him by the liquidator. Section 184 provides for the settlement of the list of contributories by the Court as soon as possible after it has made a winding up order, while section 187 empowers the Court to make calls on and order payment thereof by all or any of the contributories for the time being settled on the list, to the extent of their liability. There seems to be a slight confusion between sections 159 and 187 as they are worded at present. In order to clarify the position, we suggest that section 159 should be amended by the deletion of the words "by the liquidators". Incidentally, this amendment will help to define with greater precision than hitherto a contributory's liability, which arises from the moment calls are made.

Jurisdiction in winding up cases

(Pages 313
& 314 of the
Annexure)

207 It will be recalled that in paragraph 31, Chapter IV we suggested that certain types of cases under the Indian Companies Act, including winding up proceedings under Part V of the Act in the case of the larger companies might be tried exclusively in the High Courts. Our spec

proposals on this subject are that (a) the winding up proceedings, in respect of companies with a subscribed share capital of rupees one lakh or more, should be instituted only in the High Courts, and that such cases should not be transferable to the District Courts, (b) that suits in respect of arrears of calls should be decided by summary proceedings, and (c) that all suits by or against a company in winding up should, notwithstanding any provision in any law for the time being in force, be instituted in the Court in which the winding up proceedings are pending

We make the first proposal in view of the complexity of winding up proceedings in the case of larger companies. We recognise that, in some cases, this limitation of jurisdiction might cause inconvenience to some of the interested parties, but the balance of advantage would seem to lie, in our view, in the concentration of important cases in the High Courts. The registered offices of most of the larger companies are located at the seats of the High Courts. Further, we were assured by many witnesses, that it was the usual practice, in all important and complicated winding up cases, for the litigants to seek the advice of members of the High Court Bars. If this is so, the balance of convenience would be definitely in favour of having such suits tried in the High Courts.

Our second proposal hardly calls for any elucidation. Our third proposal, may, however, provoke some comments. We are, however, satisfied that, in the case of companies in liquidation, it is on balance an advantage to all concerned, including the parties which have a claim against the companies, to institute suits relating to its affairs in the Court where the winding up proceedings are pending.

Application for winding up

208 Under section 166 of the present Act, the parties which can present petitions to the Court for the winding up of a company include the company, its creditors and contributories, and the Registrar of Joint Stock Companies. The Registrar's power is, however, limited exclusively to the case where a company is unable to pay its debts and can be exercised only with the previous sanction of Government. We suggest that this power should be extended to the cases where a company fails to hold a statutory meeting or to file a statutory report or when it fails to commence business within a year from its incorporation. In such cases, the prior sanction of Government would hardly seem to be necessary. Clauses (ii) and (iii) of section 162 already provide for the presentation of petitions for winding up on these additional grounds, and we see no reason why the persons who can present petitions on these grounds should not include the Registrar of Joint Stock Companies. (Page 314 of the Annexure)

Petition by
official
receiver
or Central
Authority
for winding
up
(Page 314
of the
Annexure)

209 Following sub-section (2) of section 224 of the English Companies Act, 1948, we also recommend that the official receiver should be empowered to present a petition for winding up, in the case of a company which is being wound up voluntarily or subject to the Court's supervision, where it is established that, without compulsory winding up by the Court, the voluntary winding up cannot be continued, with due regard to the interests of the creditors and contributories

As a corollary to our recommendations in paragraph 190, Chapter XII, that the proposed Central Authority should have the power to investigate the affairs of a company of its own motion under certain circumstances, we recommend that in any case, falling within any of these circumstances where the Central Authority finds, on a perusal of the report of the inspector, that it is in the interest of the company to wind it up, it should have the power to present a petition for this purpose to the Court

Commencement of winding up by the Court

(Page 315
of the
Annexure)

210 The effect of section 168 of the Act of 1913 is that an order for winding up is deemed to have retrospective effect as from the date of the presentation of the petition. A slight complication may arise in those cases, where a company is being wound up voluntarily, but, on the presentation of a petition to the Court, the proceedings are subsequently converted into a case of winding up by the Court. In these cases, it is important that the date of commencement of the winding up should be the date when the first resolution for the voluntary winding up of the company was passed. The date of winding up by the Court is important for many practical reasons. Hence, we feel that the consequences, which follow the presentation of a petition to the Court, should also attach to voluntary winding up proceedings, which have been subsequently converted into cases of winding up by the Court. We, therefore, recommend that this section should be suitably amended in the light of the provisions of section 229 of the English Companies Act, 1948

Powers of the Court on hearing petition

(Pages 315
& 316 of the
Annexure)

211 Section 170 of the Act of 1913 does not contain the powers given to the Court under sub-sections (2) and (3) of section 225 of the English Companies Act, 1948. The former sub-section of the English Act provides that, where a petition for winding up is presented to the Court on the 'just and equitable' ground by the members of a company as contributories, the Court shall make a winding up order if it is of opinion that, in the absence of any other remedy it will be just and equitable to wind up the company. The Court is precluded from making such an order only if it is of the opinion that although another remedy is available the petitioners are acting unreasonably in seeking a

winding up order instead of any other remedy. This sub-section, therefore, qualifies the rule of law, under which prior to the amendment of 1947 no Court in England would have normally made a winding up order if some other remedy was available. The present provision in the English Companies Act, 1948, was made on the recommendation of the Cohen Committee. We consider that a similar sub-section should be added to section 170 of the Indian Companies Act.

Sub-section (3) of section 225 of the English Act provides that, where a petition for winding up is presented on the ground of default in delivering the statutory report to the Registrar or in holding the statutory meeting, the Court may, instead of making a winding up order, direct that the statutory report shall be delivered or that a meeting shall be held. We consider that this is a salutary provision and recommend that this alternative power of compelling delivery of the statutory report or of calling the statutory meeting should be conferred on the Court by the insertion of a similar sub-section in section 170 of the Indian Act.

Liquidators

212 As we have already noticed, the Indian Companies (Amendment) Act 1936, made some extensive changes in the provisions of the Act of 1913, relating to liquidators, their powers and duties, the manner in which they should function and the control that should be exercised over them by the Court. We have got only two important recommendations to make. First, that the remuneration of a liquidator in voluntary winding up should be remuneration fixed at the time of his appointment, and such remuneration should not be increased under any circumstances. In such winding up private individuals are usually appointed liquidators and their remuneration is fixed at the meeting where a resolution for the winding up of the company is passed. It has been represented to us that in certain cases the liquidators appointed show little anxiety to dispose of the proceedings energetically and are more often than not interested mainly in their remuneration. As the shareholders take very little interest in these cases, the liquidators often succeed in securing sanction to increases in their remuneration, with the help and support of the management of the company, while the proceedings drag on in a leisurely manner. We consider this practice wholly improper. Apart from the fact that it reduces the assets of the company concerned, the further point that this practice enables the liquidators to receive benefits from the erstwhile management of a company must necessarily derogate from their independent position. We, therefore, recommend that the remuneration and the other terms of liquidators must be fixed at the time of their appointment at a general meeting of the company concerned and should not be varied.

Remuneration of liquidators (Page 318 of the Annexure)

Permanent
official
liquidators
to be
attached
to High
Courts (Page
316 of the
Annexure)

213 Our next recommendation is that each High Court should have attached to it a permanent official liquidator, to be in charge of cases of compulsory winding up by the Court. Under section 171A of the present Act, an official receiver attached to the Court becomes the official liquidator of the company and continues to act as such, till his further continuance is terminated by an order of the Court. The Court may appoint any person as an official liquidator as soon as a winding up order is passed by it, and if it makes no such order, the official receiver automatically becomes the official liquidator of the company. The office of a liquidator has two different aspects. In the first place, he wields the powers of a company under the direction and control of the Court, and secondly, he is at the same time the representative for some purposes of both creditors and contributories. We consider that it will be easy for a person to fill these dual roles, if he is a permanent officer of the Court under whose direction he has to function.

Some special recommendations relating to voluntary winding up

Registrars
to be kept
informed of
changes in
office of
liquidators
(Page 318
of the
Annexure)

214 We received complaints from the Registrars of Joint Stock Companies that in voluntary winding up, where liquidators were sometimes changed, the Registrars were not informed of those changes. We consider it essential that the Registrars of Joint Stock Companies should be kept fully posted with all such changes in the office of a liquidator.

Liquidator
to call
creditors'
meeting in
certain
circum-
stances
(Page 319
of the
Annexure)

215 We recommend that an obligation should be cast on the liquidator in a voluntary winding up, to call a meeting of the creditors as soon as he is of the opinion that the company will not be able to pay its debts in full within the period stated in the declaration of solvency under section 207 of the Indian Companies Act. At present there is no specific provision to this effect although all conscientious liquidators are expected to do so. The point is, in our view, of sufficient importance to be the subject of a statutory provision. We also recommend that in such a case the members' voluntary winding up should be treated as a creditors' voluntary winding up, on the lines of section 288 of the English Companies Act, 1948, and that the provisions of the law relating to this latter class of winding up should apply to all such proceedings.

Declaration
of solvency
and calling
of creditors'
meeting
(Page 318
of the
Annexure)

216 Under the existing law, a members' voluntary winding up must be preceded by a declaration of solvency under section 207 by the directors of a company, before the notice of the meeting, at which the resolution for the winding up is to be proposed is sent out. In order to prevent the directors from abusing their powers, section 207 of the Act provides that the statutory declaration should be supported by the report of the company's auditors and that the declaration together with the supporting report from the auditors should be registered with the Registrar of Joint Stock Companies, before the date on which the

notice of the meeting of the shareholders is sent out. The section does not, however, state what is to happen, if the debts of a company are not, in fact, paid within a period of three years, as required under the declaration, or if the assets, when realised, are found to be insufficient for the payment of the debts. Presumably, the present Act relies on the liquidator to keep the creditors of a company informed of its financial position and to call creditors' meetings in good time. The position is, however, far from satisfactory and we consider that a provision similar to sub-section (3) of section 283 of the English Companies Act, 1948, should be incorporated in this section. Under this sub-section, the directors of a company are held liable if its debts are not paid or provided for in full, within the period stated in the declaration, unless they can prove that they made this declaration on reasonable grounds. Further, under section 207 of the present Act, there is no obligation on the directors of the company to proceed with a winding up, within a reasonable period of time, after the declaration of solvency has been made. Sub-section (2) of section 203 of the English Act requires that no such declaration shall have effect unless (a) it is made within five weeks immediately preceding the date of the passing of the resolution recommending the winding up of the company, and is delivered to the Registrar of Companies for registration and (b) it embodies a statement of the company's assets and liabilities, as at the latest practicable date before the making of the declaration. Our recommendation is, therefore, that, in view of the extensive amendments that we suggest in the present section 207, it should be replaced by section 283 of the English Act.

217 Section 335 of the English Companies Act, 1948, Disqualifies a body corporate for appointment as liquidator, and section 336 of the same Act penalises corrupt inducement, in relation to the appointment of a liquidator. No comments are necessary on these healthy provisions of the English Act, and we recommend that they should be incorporated in the Indian Companies Act. (Page 321 of the Annexure)

Preferential payments and fraudulent preference

218 Section 230 of the Act of 1913 deals with the important subject of preferential payment. The principle underlying this section is that the debts and liabilities enumerated in it should be treated as preferential debts as compared with ordinary unsecured debts. The rights of secured creditors other than debenture holders secured by a floating charge, are not affected in any way. They remain outside the scope of the winding-up proceedings and their security remains unaffected by the provisions of this section. We have set out in the Annexure to our Report the details of our recommendations, which broadly follow the provisions of the English Act. (Page 321 of the Annexure)

of the English Companies Act, 1948. Briefly, the more important of these recommendations are as follows

- (i) the position of clerks, servants and labourers, who are workmen [*vide* sub-clauses (b) and (c) of sub-section (1) of section 230], are brought in line,
- (ii) the maximum amount of wages or salaries in respect of which preferential claim should be admissible is increased from three to four months' emoluments, subject to a maximum of Rs 1,000. We recommend that holiday wages should be included within the definition of wages or salary subject to this maximum,
- (iii) expenses of any investigation, carried out under any of the provisions of the Act, should rank for the preferential payment

In this connection we should like to refer to a memorandum that we received from the Central Board of Revenue, on the question of a priority to be given to Crown demands generally and in particular to arrears of income-tax, super-tax and corporation tax. It was suggested that there should be no time-limit for the preferential payment of these Crown debts and that section 230 of the Indian Companies Act should be amended accordingly. The practical difficulty of giving effect to this suggestion is that it would place a great majority of the unsecured creditors of the company at the mercy of the income-tax authorities, inasmuch as, whatever may be the nature of the security on which they may have lent money to a company at the time of the loan, the unforeseeable demands of the income-tax authorities on the company without any time-limit would rank over the claims of such creditors. In these circumstances, it may be extremely difficult for the company to raise capital for its working. In this connection we would draw attention to the provisions of clause (a) of sub-section (1) of section 319 of the English Companies Act, 1948, under which arrears of land tax, income-tax, profits tax, excess profits tax or other assessed taxes rank in priority over other debts of a company only if they have been assessed on the company upto a particular date, namely, 5th April prior to the appointment of the liquidator or resolution for the winding up of the company and do not exceed in amount the whole of one year's assessment. It will be noticed that by comparison the provision of clause (a) of sub-section (1) of section 230 of the Indian Companies Act is much wider and gives much more latitude to the income-tax authorities. For, under these provisions, arrears of taxes would rank in priority if they have become due and payable within twelve months next before the date on which they are payable irrespective of whether such taxes have been assessed on the company or not. We are aware of the large arrears of income and other taxes which are due by many companies, which are in liquidation, but we would venture to think that the remedy for this unsatisfactory situation is not the conferment of preferential rights

without limit to the income-tax authorities under section 230 of the Indian Companies Act but the energetic completion of assessment proceedings and vigorous measures for the collection of the assessed taxes

219 In regard to fraudulent preference, we recommend that section 231 of the Act of 1913 should be replaced by provisions similar to those contained in sections 320 and 321 of the English Companies Act, which are more comprehensive than section 231 of the Indian Act and also provides for the determination of the rights and liabilities of certain fraudulently preferred persons in a manner which has not been attempted in the latter. The object of these changes is to afford greater protection to the creditors of the company. One of these changes which merits special mention is the extension of the period from three to six months for the application of the principle of fraudulent preference and a similar extension of the period from three to twelve months in the case of any fraudulent creation of a floating charge. Section 233 of the Act would need a suitable amendment to provide for this extended period of limitation.

Fraudulent preference
(Pages 322 & 323 of the Annexure)

Offences antecedent to or in course of winding-up

220 On the important subject of recovery of money or property, misapplied or retained by a promoter, director or other officer of a company or of money or property, in respect of which he can be held liable on account of misfeasance or breach of trust, we consider it necessary to strengthen the provisions of the existing law. Our main recommendations on this subject are briefly as follows —

(Pages 323 & 325 of the Annexure)

(1) section 235 of the Indian Act should be amended in two important respects —

- (a) besides the categories of persons mentioned in sub-section (1) of this section the directors or partners of a managing agency company or firm should also be deemed to be officers of the company for the purposes of this section. Where a company acts as a managing agent, the director of the managing agency company is in law the officer of the managing agency company but not necessarily of the managed company. Therefore, in cases of misfeasance it will be difficult for the liquidator to recover the moneys improperly dealt with by any director of the managing agency company unless for the purpose of this section he is also deemed to be an officer of the managed company. We consider that this loophole of escape for the directors of a managing agency company should be closed. As regards the partners of a managing agency firm the position is slightly different inasmuch as they are all jointly and severally liable. Nevertheless, we can visualize cases where an ex-partner may have

to be included in any proceeding for recovery of the assets of the company by the liquidator. We therefore, consider it desirable that the partners of a managing agency firm should also be deemed to be officers of the company for the purpose of this section,

- (b) the period of limitation mentioned in subsection (1) for the recovery of money or property should be extended from three to five years. We note that the English Companies Act, 1948, contains no such limitation and at one stage of our deliberations we considered the desirability of following the English provision. But on further reflection, we decided to proceed more cautiously in the matter. It will be recalled that prior to the Indian Companies (Amendment) Act, 1936, the period of limitation under this section was the time as laid down in the Indian Limitation Act, 1908, for suits. The Amendment Act of 1936 laid down a new period of limitation, *viz*, three years from the date of the first appointment of the liquidator or of the misapplication, retainer, misfeasance or breach of trust, as the case might be, whichever was longer. We propose that this period should be further extended to five years. It would be desirable to watch the results of our recommendation for some time before Government consider the application of the English provision to this country,
- (iii) a section similar to section 332 of the English Act, which imposes a personal responsibility, without limitation of liability, on any person, who has been privy to any transaction of a company, carried out with intent to defraud a creditor, or for any other fraudulent purpose, should be incorporated in the Indian Act. The Cohen Committee had recommended this extension of the scope of the relevant section [section 275(1) of the English Companies Act of 1929]. At present there is no counterpart to this provision of the English law in the Indian Companies Act,
- (iii) new sections similar to sections 330 and 331 of the English Companies Act, 1948, should be inserted in the Indian Act. These provisions penalise frauds on creditors committed by officers of a company which subsequently goes into liquidation, and also failure to keep accounts for a period of two years prior to the liquidation,
- (iv) as an ancillary and supporting measure, we recommend that the period, during which the papers and documents of a company which has been wound up should be preserved, should be extended from three to five years in section 242

of the Indian Companies Act, and that a provision should be made on the lines of section 341 of the English Companies Act, enabling the Central Government to make rules for this purpose. Unless the law lays down rules for the maintenance or preservation of records, they are not likely to be maintained properly for the purposes for which they are intended

Winding-up rules

221 It was represented to us, in course of our enquiry, both by the Chambers of Commerce and the representatives of the legal profession, whom we had the opportunity of examining, that one urgently needed reform in liquidation proceedings was the uniformity of winding-up rules. These rules are now framed by the High Courts, and although they are generally based on the English winding-up rules, we were told that the divergence of practice in the different High Courts had resulted in much avoidable confusion and difficulty. We are entirely in favour of this suggestion and are unable to see any serious practical difficulty in giving effect to it. We, therefore, recommend that, as soon as Government have formulated their decision on our recommendations relating to the amendment of the Indian Companies Act, they should take up this matter with the Supreme Court of India, with a view to evolving a set of uniform winding-up rules in consultation with the High Courts. After such rules have been framed, it would be for the respective High Courts to consider to what extent they can be applied to District Courts under their supervision and control.

(Page 326
of the
Annexure)

Section 246 of the Act as amended by the Indian Companies (Amendment) Act, 1936, not only requires the High Courts to make rules relating to the winding-up of companies but also empowers them to make rules for the other purposes specifically mentioned in this section and also generally for all applications to be made to the Court, under the provisions of the Act. In pursuance of this section several High Courts have made rules for matters other than winding-up, e.g., meetings of creditors and members, reduction of capital, meetings held under directions of the Court, issue of shares at a discount, presentation and hearing of petitions and application and proceedings in Courts, application by directors or officers, etc. The need for uniformity in these cases is also urgent as in the case of winding up proceedings and we suggest that any machinery that may be set up for securing such uniformity should deal with all rules framed by the High Courts under section 246 of the Act.

Re-arrangement of the provisions relating to winding-up

222 There is one formal recommendation that we should like to make under this Chapter. It would be an advantage if the provisions relating to winding-up, now included in Part V of the Act of 1913, were suitably rearranged so a

(Page 31
of the
Annexure)

to bring them under appropriate headings and to eliminate avoidable repetition, wherever similar provisions could be brought together in one or more sections. Thus, sections 174, 223 and 239 of the present Act, which deal with the same subject could, in our view, be conveniently consolidated into one section, while sections dealing with offences antecedent to or in course of winding-up could be more logically brought together under a central heading instead of being lumped together under the omnibus heading, "supplemental provisions", as in the present Act. We do not wish to go into further details, but suggest that the re-arrangement of the matter contained in the present Part V of the Act of 1913 should be given due consideration at the time of the drafting of the future Bill to amend the Indian Companies Act.

CHAPTER XIV

FOREIGN COMPANIES

223 Sections 277 to 277E of the Act of 1913 deal with companies established outside India but carrying on business in this country. As we have already said in paragraph 29, the extent to which foreign capital should be admitted into our country and whether any restrictions should be placed on the operation of foreign capitalists is a question of economic policy and one for Government to decide. It has little to do with company law, and we do not, therefore, feel called upon to express any views on it. It is, however, a well-established principle of commercial law in all advanced countries that a corporation, duly incorporated in one country, is recognised as a corporation in others and it would be contrary to the accepted policy of nations to try and prevent a company incorporated in one country from carrying on business in another, without being incorporated there. It is, however, open to a country to regulate the activities of a foreign company within the limits of its jurisdiction. The principle underlying sections 277 to 277E of the Act of 1913 is that a company, incorporated outside India, should, in the matter of supplying information to the public about its constitution, directorate, etc., of submission of accounts to the Registrar of Joint Stock Companies and of the registration and contents of prospectuses be placed as far as practicable on the same footing as a company incorporated in India. We have considered it desirable to recommend a redraft of these sections (*vide* item 27 of the Addendum to the Annexure of our Report) which follow very closely the wording of sections 406 to 423 of the English Act except that sections 408, 416 and 418 of that Act which have no application to this country have been omitted from our redrafts.

Adaptation
of the provi-
sions of the
English
Act
(Pages 332
& 333 of the
Annexure
and pages
432—440 of
the
Addendum

In these redrafts we have retained the provisions of section 277D about registration of charges on properties in India, which are created or acquired by companies incorporated outside India but having an established place of business here. Similarly, we have retained the provisions of section 277E which extends to these companies the principles contained in sections 118 and 119. The provisions of section 277C relating to canvassing for sale of shares is already covered by our general recommendation that the prospectus requirements of foreign companies should be the same as those of companies incorporated in this country. These requirements, in the case of domestic companies, prohibit such practice, and it will be seen from the explanation to our redraft of section 102 (*vide* page 389 of the Addendum) that for the purpose of this section shares or debentures of foreign companies stand on the same footing as those of domestic companies.

Principal changes . 224 The principal changes recommended by us in our redrafts are as follows —

- (1) As regards documents to be delivered to the Registrar of Joint Stock Companies by oversea companies carrying on business in India, we recommend that the existing particulars about directors, managers, etc., required under section 277(1)(b) should be considerably amplified in respect of their former names, if any, the residential address, nationality, occupation, details of the directorships which they hold, etc
- (2) As regards any alteration in the above documents which are to be delivered to the Registrar by oversea companies, we recommend that the alteration in the list to be filed with the Registrar should contain particulars of any person occupying the position of a Secretary, by whatever name called
- (3) As regards the accounts, we recommend that in substitution of sub-section (3) of section 277 of the Act of 1913, a foreign company should be required to make out its balance sheet and profit and loss account, in such form and containing such particulars, as it would have had to do in this country, if it had been a company within the meaning of the Indian Companies Act

It will be recalled that when the Amendment Act of 1936 was under consideration it was represented to Government that, if foreign companies were required to prepare balance sheets and profit and loss accounts in the form required for a company incorporated in India, considerable difficulty would be experienced by certain companies incorporated abroad. It was, therefore, considered sufficient that these companies should file with the Registrar, a copy of their own balance sheet, but should supplement it with further documents giving information, which might be deemed essential. Form H in the Third Schedule of the Act attempted to embody this requirement. Our present recommendation is based on the analogous provisions of section 410 of the English Companies Act, and does away with this concession to companies incorporated abroad, and places them, in regard to the submission of accounts, on the same footing as Indian companies.

- (4) As regards the office, where the documents would have to be filed by companies incorporated abroad, we recommend that they should submit them to the Registrar of Joint Stock Companies, New Delhi, in triplicate, and one set to the

Registrar of the State where the principal business of the foreign company is carried on. Our recommendation will facilitate the business of the foreign company, and at the same time enable the State in which the principal business is being carried on to keep track of such companies.

- (5) We recommend that the prospectus requirements of foreign companies should be brought in line with those of companies incorporated in India, subject to certain minor changes, e.g., it would be no longer necessary for a foreign company to state its objects.
- (6) We also think it most desirable that foreign companies operating in India and whose shares are quoted in a leading stock exchange in India should maintain a branch register in India.

CHAPTER XV

MISCELLANEOUS PROVISIONS

225 In this Chapter, we propose to comment on a few important subjects of a diverse nature which we have found it convenient to bring together

Information as to mortgages, charges, etc

Registration
of floating
charges
Register of
mortgages
(Page 302
of the
Annexure)

226 Section 109 of the present Act enumerates the transactions which must be registered, and provides that unless they are registered in the manner indicated in the Act they will be void against the liquidator or any creditor of the company. Sub-section (2) of this section is designed to affect transferees with the notice of such transactions as from the date of the registration. One particular point arising out of this section seems to have created some practical difficulty. It was pointed out to us that a floating charge created by a company, which has to be registered under this section, also requires registration under the Indian Registration Act. Registration under the latter Act, however, is effected in Book IV of the Form in which documents registered under this Act have to be entered. This Book is not available for inspection by the general public. We, therefore, recommend that Government should consider one or other of the following alternatives —

- (i) the amendment of the Indian Registration Act so as to provide that a floating charge does not require registration under it, or
- (ii) the amendment of the Indian Registration Act so that a floating charge can be registered under Book I, which is available for inspection by the public

Sections 123 and 124 of the present Act deal with the maintenance of a register of mortgages and the right to inspect this register and copies of instruments creating mortgages and charges. Section 125 similarly provides that any registered holder of debentures or any other shareholder in a company will have the right to inspect the register of debenture-holders to be maintained under this section, but it is only the registered debenture-holder who will be entitled to ask for a copy of the debenture trust-deed. We consider that, in the interests of the company, this right should be extended to all shareholders on payment of the usual fees, and that sub-section (3) of this section should be so amended as to compel the supply of a copy of the debenture trust-deed to a registered debenture-holder or to any other shareholder, where a company refuses to supply it.

227 In this connection, we would make two other recommendations relating to debentures. Complaints were made to us that, in some companies debentures were issued with voting rights, thereby placing the debenture-holders in a much more advantageous position than the holders of equity capital. In view of the secured position of the former, under the usual terms of debenture trust-deeds, we consider it wrong in principle that their position should be further strengthened by giving them the right to vote on the same basis as the shareholders of the company. If debenture-holders possess voting rights, they may be in a position to influence the policy of the company in a manner which may be detrimental to the interests of the general body of shareholders. Apart from other abuses to which this practice is liable and on which we need not dilate in this context, we see no good reason for conferring voting rights on debenture-holders. A suitable provision should, therefore, be made at an appropriate place in the Act prohibiting this practice.

Voting right
of debenture-holders
(Page 303
of the
Annexure)

228 The other point about debentures on which we should like to comment is the liability of trustees for debenture-holders. There is no provision in the Indian Companies Act similar to section 88 of the English Act. Both the Cohen Committee and the Millin Commission in South Africa recommended the adoption of the provisions embodied in this section of the English Act. The effect of this section is that a general provision in any trust-deed exempting the trustees for debenture-holders from liability is rendered void, but "enabling" clauses as distinct from "indemnity" clauses are permitted. This section does not affect the right of existing trustees, who retain whatever rights or indemnity they enjoyed before the Act, but prohibits the general exemption or indemnity in regard to new appointments. This provision in the English Act was designed to prevent the common practice, under which most trustees for debenture-holders were appointed under trust deeds containing the clause which absolved trustees from liability for anything but their wilful neglect or default. Trustees for debenture-holders should show the same degree of care and diligence in administering debenture trusts as are required of other trustees and we see no reason why they should be permitted to escape their liability where they do not do so. We, therefore, recommend that a new section on the lines of section 88 of the English Act should be incorporated in the Indian Companies Act.

Liability of
trustees for
debenture
holders
(Pages 303
& 304 of the
Annexure)

Arbitration and compromise

229 Sections 152, 153, 153A and 153B deal with the powers of a company to refer matters to arbitration and to compromise with creditors and members. We recommend that a new section analogous to section 207 of the English Companies Act may be inserted in the Indian Companies Act after section 153 of the present Act. Under the present section, it is possible for a company proposing a compromise or arrangement between it and its creditors or

Court's
sanction to
proposed
compromise
or arrange-
ment
(Page 309
of the
Annexure)

any class of them, or between it and its members or any class of them, to obtain the Court's sanction to the proposed compromise or arrangement, without informing the Court of the material points of the compromise agreement or without apprising it of the personal interest, if any, of the directors or trustees for debenture-holders who may be sponsoring the compromise or arrangement scheme. We consider that this defect in the present provisions should be remedied. Section 207 of the English Companies Act, 1948, fills up this lacuna. It provides for the circulation of a statement, explaining the objects of the proposed compromise or arrangement scheme along with the notice of the meeting to be convened for considering the scheme. The statement is required to explain clearly

- (a) the effect of the compromise or arrangement, and
- (b) the manner in which the material interests, if any, of directors or trustees for debenture-holders are likely to be affected by the compromise or arrangement

Compromise
between
foreign and
Indian com-
panies
Page 310
of the
Annexure)

230 We also consider that a suitable provision should be made in section 153A of the present Act, whereby compromise or arrangement between foreign companies and companies within the meaning of the Indian Companies Act may be facilitated. This object can, perhaps, be achieved by a suitable amendment of the definition of a company in sub-section (5) of this section, but it is a matter which we would leave to Government to decide.

Acquisition
of shares
of dissenting
shareholders
Page 310
of the
Annexure)

231 We also recommend that section 153B, which empowers a company to acquire the shares of shareholders dissenting from the schemes or contracts approved by the majority of the members, be so amended as to bring it in line with the provisions of section 209 of the English Companies Act, 1948. This section differs from section 153B of the Indian Act, in the following important respects

- (i) the majority of shareholding, required to acquire the shares of dissenting members has been increased from seventy per cent as provided for in sub-section (1) of section 153B of the Indian Act to ninety per cent. Further in computing this majority, the shares already held by the transferee company or its nominees are to be excluded,
- (ii) notice of such majority holdings should be given to the dissentients, and
- (iii) all such compulsory transfer of shares should be by instruments of transfer, executed on behalf of the dissenting shareholders concerned, by persons appointed by the transferee company, and on its own behalf by the company.

These amendments are mainly designed to strengthen the position of minority shareholders and further to safeguard their position.

Winding-up of unregistered companies

232 We have one particular point under this heading to which we should like to draw the attention of Government. Under section 270 of the Indian Companies Act, 1913, foreign companies fall within the meaning of unregistered companies for the purpose of this section. In view of the amendment of section 2A by the Adaptation Order, 1948, we presume that a company, the registered office of which is in Pakistan and which was immediately before the partition of India a company within the meaning of this Act, will be deemed to be a foreign company. In any case, the position regarding Pakistan companies should be clarified, if necessary, by a suitable amendment of section 270.

(Para 331
of the
Annexure)

Legal proceedings, offences, etc

233 In Chapter XII of our Report dealing with inspection and investigation, we have already commented on the provisions of our redraft of section 278, which deals with cognizance of offences under the Indian Companies Act. The reasons which induced us to recommend some changes in this section have been already explained in paragraph 203 and we need not repeat them here.

Cognizance
of offences
(Page 335
of the
Annexure
and pages
441 & 442
of the
Addendum)

234 It will be recalled that the recommendations that we have made in Chapter XII dealing with inspection and investigation, provide for the inspection of the books of account of a company, by an inspector appointed under the provisions of that Chapter. The Cohen Committee considered that it was desirable to strengthen these powers generally, and, in its opinion, this step would materially assist in reducing frauds and long-term malpractices in company management. Following this recommendation, it has been provided in section 441 of the English Companies Act, 1948, that where any person, while employed as an officer of the company, is suspected to have committed an offence in connection with the management of the company's affairs and there is reasonable cause to believe that evidence of the commission of the offence is to be found in any books or papers kept under the control of the company, the Board of Trade or any Chief Officer of Police may apply to a judge of the High Court in Chambers for an order authorising

Inspection
of company's
books where
no investi-
gation is
instituted
(Page 335
of the
Annexure)

- (a) any person mentioned in the application to inspect the said books or papers for the purpose of investigating the offence, or
- (b) requiring the secretary of the company or any other officer to produce the said books or papers to a person mentioned in the order

This section thus authorises the inspection of a company's books even if no formal investigation into its affairs has been instituted. The requirement that an order under this section can be passed only by a judge in Chambers of the High Court ensures that reasonable grounds for suspicion will have to be established before an order under this

section will be passed We recommend that a similar provision should be incorporated in the Indian Companies Act

Penalty for certain offences to be specified in a schedule (Page 336 of the Annexure)

235 Section 282 of the present Act penalises the making of false statements in any return, report, certificate, balance sheet or other document, required by or for the purpose of any of the provisions of the Act In view of the various new requirements as to prospectus, accounts, auditors' report, returns etc, recommended by us, we consider it desirable that the matters in respect of which the making of a false statement is punishable under section 282 should be clearly specified in a Schedule as has been done in Fifteenth Schedule of the English Act

Securities lodged by, and provident funds of, employees (Page 336 of the Annexure)

236 Section 282B of the present Act was inserted by the Indian Companies (Amendment) Act, 1936, and was designed to prevent the misuse of securities lodged with a company by its employees under their contracts of service and to safeguard provident funds A statutory duty is cast upon the company to deposit all moneys or securities deposited with it by its employees in pursuance of a contract of service in a scheduled bank and no portion of such amounts is to be utilised for any purpose other than those agreed to in the contract of service In regard to provident funds created for the use of employees, sub-section (2) of the section provides that all moneys contributed to such fund, whether by the employees or employers and accruing thereto since the 15th January, 1937, are to be kept invested in trust securities as defined in section 20 of the Indian Trusts Act In order to avoid inconvenience to companies it was also provided in this sub-section that such funds of the then existing companies should be invested in trust securities in course of ten years It was represented to us that, where separate trusts are executed for the purpose of giving effect to the provisions of this sub-section, the obligation to carry out the provisions of the section should be vested in the trustees and not in the companies, except that the latter should collect the contributions of employees and make them over with their own contribution to the trustees We recommend that section 282B of the present Act may be amended accordingly

False personation (Page 336 of the Annexure)

237 There is no provision in the Indian Companies Act for penalising the false personation of a shareholder Section 84 of the English Companies Act, 1948, which reproduces section 71 of the English Companies Act, 1929, imposes heavy penalty on any person, who falsely and deceitfully personates any owner of any share or interest in any company, and thereby obtains or endeavours to obtain any such share or interest or share-warrant or coupon or receives or endeavours to receive any money due to any such owner We suggest that a similar provision should be inserted in the Indian Companies Act under this Part of the Act

238 Section 287 of the present Act provides for savings for the Indian Life Assurance Companies Act, 1912, and the Provident Insurance Societies Act, 1912. We consider that it would be desirable to replace this section by a more comprehensive section, which would set out those sections of the Indian Companies Act, which should not apply to banks, insurance companies, electricity undertakings, etc., which are governed by specific Acts relating to them. It may be an advantage to set out these sections in a schedule, so that it may show at a glance which of the provisions of the Indian Companies Act would not apply to these groups of Companies.

Applicability of Act to banks insurance companies etc. (Page 339 of the Annexure)

The first schedule—Table “A”

239 We recommend that regulations 4, 50, 59, 75 and 83 in Table ‘A’ of the Indian Companies Act and regulation 73 in Table ‘A’ of the English Companies Act, 1948 should be made compulsory. Regulation 4 deals with the modification of class rights and in our view it is essential that the provisions of this regulation should be made compulsory, so that the articles of association of companies may not vary their terms to the prejudice of particular classes of shares. Articles of association of some companies do not contain provisions analogous to this regulation. The result is that the provisions of section 66A are rendered nugatory in such cases. Regulation 50 defines what would be deemed to be the special business transacted at a general meeting of the company. Under this regulation, all business transacted at an extraordinary general meeting is deemed to be special business, whereas all business, except the following, transacted at an ordinary meeting would be so deemed—

Additional compulsory regulations (Pages 341 & 342 of the Annexure)

- (a) the sanctioning of dividend,
- (b) consideration of the accounts, balance sheets, directors’ reports and auditor’s report,
- (c) election of directors and other officers in place of those retiring by rotation,
- (d) fixation of the remuneration of auditor.

We recommend that this regulation should be made compulsory so that the provisions of the Act relating to the manner in which all such special business has to be carried on may apply compulsorily to all companies and may not be varied by the articles of association of a particular company.

Regulation 59 deals with demand for poll on the question of election of the Chairman of a general meeting or adjournment of the meeting. In the very nature of things, poll in respect of the above matters has to be taken at the meeting, otherwise there would be a deadlock. This is a common regulation but the articles of association of some companies do not include it.

We also suggest that a new compulsory regulation on the lines of regulation 73 of the English Act dealing with revocation of proxies should be adopted as a compulsory regulation in Table "A" as regulation 67A

Regulation 75 deals with the minutes of directors' meetings. We have already commented in Chapter IX (paragraph 110) on the need for standardising the form in which the minutes of directors' meetings should be recorded and have no further comments to make on the subject except to recommend that this regulation should be made compulsory.

As regards regulation 83, we recommend that this should be amended as follows —

"Subject to section 83B(2), the company may, from time to time, by ordinary resolution, increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office."

We also recommend that the following new compulsory regulation may be inserted as regulation 82A after the present regulation 82 —

"Notwithstanding any provisions to the contrary contained in the articles of a company a person who is not a retiring director shall be eligible for election to the office of director at any general meeting if he or some other member intending to propose him has at least 10 days before the meeting left at the office a notice in writing under his hand signifying his candidature for the office of director or the intention of such member to propose him. This provision shall not apply to private companies other than the subsidiaries of public companies."

The object underlying this regulation is twofold. Firstly, it deals with those cases where long periods of notice are prescribed by the articles. The period of notice will now be limited to ten days which we consider to be fair and reasonable. Secondly, it deals with those cases where, apart from the period of notice, other unfair provisions are made in the articles of association under which, for example, a new candidate has either to be approved by the board or has to be on the company's register for a certain period or has to be the holder of a particular number of shares.

Miscellaneous provisions

Regulation
107 not to
be retained
as a compul-
sory regula-
tion
(Page 341
of the
Annexure.)

240 One important omission from Table "A" to which we think we should refer is regulation 107. Under the present Act, this is a compulsory regulation, but as we have already recommended in the Chapter of our Report on Accounts and Audit that the provisions of the Indian

company law relating to the preparation and the presentation of the profit and loss account or the income and expenditure account of a company, as the case may be should be laid down in the Act itself, it is no longer necessary to retain the present regulation 107 as a compulsory regulation in Table "A". Our proposals on the subject of the profit and loss account or the income and expenditure account of a company have been fully explained in paragraphs 152—169 of our Report and call for no further comments in this context.

241 There is another regulation to which our attention has been drawn by some witnesses and on which we would like to make a few comments. Regulation 7 of Table "A" provides that if a share certificate is defaced, lost or destroyed, it may be renewed on payment of such fee, if any, not exceeding eight annas, and on such terms, if any, as to evidence and indemnity as the directors think fit. It was complained to us that the requirements as to evidence and indemnity varied so enormously from company to company, that in some cases it became very difficult for a shareholder, who had lost a share certificate to obtain a copy of it, except at considerable cost and after a good deal of delay and harassment. We recognise that it is difficult to lay down any hard and fast rule on this subject and that the primary consideration in this matter should be the interest of the company concerned. Nevertheless, we think it should be always possible for the directors of a company, in all genuine cases to reduce the formalities, which a shareholder is required to comply with under this regulation, to a minimum, and to ensure that he is not subjected to unnecessary expense or procedural delay.

Desirability
of reducing
formalities
necessary for
renewing
defaced,
lost or des-
troyed share
certificates

242 Having regard to the importance of the provisions of the compulsory regulations in Table "A", we recommend that they should be inserted as independent sections in the Indian Companies Act. If this recommendation is not accepted, we are opposed to the conferment of any powers on the Central Government or Central Authority to amend any of these regulations. Sub-section (2) of section 151 of the present Act permits the Central Government to alter any of the tables and forms in the First Schedule, although sub-section (3) provides that no alteration made by the Central Government in Table "A" in the first Schedule shall affect any company registered before the alteration, or repeal, as respects that company, any portion of that Table. As the compulsory regulations in Table "A" are as good as the provisions of the Act itself, it is clearly wrong in principle to permit the Central Government or Central Authority to amend them.

Incorporation
of compulsory
regulations
as sections
of the Act
(Page 340
of the
Annexure)

We have already recommended in paragraph 160 that the form of the balance sheet should only be amended in the manner suggested in our redraft of section 132 in item 22 of the Addendum.

PART III

In this Part of our Report, we deal with some problems relating to the administration of the Indian Companies Act. In Chapter XVI, we describe the present system of administration. In Chapter XVII, we elucidate our recommendations as to the reorganisation of the existing machinery for the administration of the Indian Companies Act. They are based on our proposal for the centralisation of the administration of the company law and the establishment of a Central Statutory Authority, for dealing with the subject of company law in all its diverse aspects. We explain at some length the structure and functions that we propose for this organization. In Chapter XVIII we comment on the present state of company statistics in this country, as this matter is closely associated with the problem of company law administration. In Chapter XIX with which we conclude the Report, we plead for a comprehensive consolidating Bill and express the hope that our recommendations will achieve those basic objects which we have kept in the forefront of our enquiry.

CHAPTER XVI

ADMINISTRATION OF THE INDIAN COMPANIES ACT

(Part VI of the Indian Companies Act)

The present position

243 In Chapter XII of our Report, we have referred to the complaints, which we received from the representatives of the business community as well as of shareholders and the general public about the inadequate and perfunctory manner in which the provisions of the present Act relating to inspection and investigation were administered. This complaint was part of the general dissatisfaction with the administration of the Act as a whole which was expressed to us by several witnesses. Some of them, indeed, went so far as to suggest that the Indian Companies Act was, perhaps, the most under-administered of the Central Acts relating to trade and industry. We are free to admit that this criticism is not entirely unfounded, but it seems to us that, in order to obtain a correct and balanced perspective, it is necessary to appreciate the circumstances, which have, in the past, affected the administration of company law in this country. We, therefore, make an attempt in the following paragraphs to describe the present system of administration as briefly as we can.

244 The Indian Companies Act, 1913, is an Act of the Central Legislature. Under the present Constitution, the Indian Parliament derives its powers to make laws in respect of the incorporation, regulation and winding up of trading corporations from article 246 of the Constitution read with item 43 of List I—Union List, in the Seventh Schedule of the Constitution. Item 44 of List I, in the same Schedule, confers similar powers on the Indian Parliament to legislate for corporations with objects not confined to one State. The executive authority for the administration of the Indian Companies Act is also vested in the Central Government. More specifically, under section 248(2) of the Act, it is the Central Government which are authorised to appoint Registrars and Assistant Registrars as they think necessary for the registration of companies under the Act, and to make regulations with respect to their duties. Further, section 2(12) of the Act provides that wherever any matter is stated to be prescribed under this Act, it means that so far as the provisions of the Act relating to the winding up of companies are concerned, the rules should be made by the High Court, while in respect of the other provisions, the rules should be framed by the Central Government.

Powers of
legislation
for joint
stock
companies
under the
Constitu-
tion

Delegation
of functions
by Central
to State
Govern-
ment

245 Although the legislative and executive authority in respect of the Indian Companies Act is thus vested in the Central Government, it is one of these paradoxes of Indian administration, with which students of India's recent constitutional history are familiar that, in practice, the Central Government have had so far very little to do with its administration. Instead they have been content to delegate all their functions under the Act, except a few, to the Governments of Part A, Part B and Part C States in exercise of the powers conferred by section 124(1) of the Government of India Act, 1935, and clause (1) of article 258 of the Constitution. The powers thus delegated include the power to appoint Registrars, Assistant Registrars, etc, and are so extensive that, for all practical purposes, the responsibility for the administration of the Indian Companies Act has been transferred to the State Governments concerned, as if the Indian Companies Act were an Act of the State Legislatures and not of the Indian Parliament. The statement below will show the nature and extent of the powers so far delegated to the Governments of the respective States.

*Statement showing the delegation of functions of
the Central Government under the Indian
Companies Act*

(All functions of the Central Government under the provisions of the Act other than those indicated below have been delegated)

States to whom delegations have been made	Functions retained by the Central Government	Relevant section
Part A, Part B and Part C	<p>(1) Permission to a company to get itself registered by a name which contains any of the following words, namely—</p> <p>‘ Crown ’, ‘ Emperor ’, ‘ Empire ’, ‘ Empress ’, ‘ Federal ’, ‘ Imperial ’, ‘ King ’, ‘ Queen ’, ‘ Royal ’, ‘ State ’, ‘ Reserve Bank ’, ‘ Bank of Bengal ’, ‘ Bank of Madras ’, ‘ Bank of Bombay ’, or</p> <p>any word which suggests or is calculated to suggest the patronage of His Majesty or of any member of the Royal family or any connection with His Majesty's Government or any department thereof; or</p> <p>the word ‘ Municipal ’ or ‘ Chartered ’ or any word which suggests or is calculated to suggest connection with any municipality or other local authority or with any society or body incorporated by Royal Charter.</p>	Sub-section (3) of section II

States to whom delegations have been made	Functions retained by the Central Government	Relevant section
Part A, Part B and Part C	(2) Change of name of company in so far as an insurance company as defined in clause (8) of section 2 of the Insurance Act is concerned	Sub-section (4) of section (11)
	(3) Fixation of rate of interest not exceeding four per cent on paid-up capital in case of a company which has issued shares for the purpose of raising money to defray expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a lengthened period	Sub-section (5) of section 107
	* (4) Framing of rules to govern the profession of accountants in India	Sub-sections (1) (2), (2A) and (2B) of section 144.
	(5) Framing of rules to provide for all or any matters which by the Act are to be prescribed by its authority (including amendments of the tables and forms in the First Schedule in regard to the scales of fees payable, and amendment of forms in the Third Schedule)	Section 151
	(6) Fixation of fees lower than those specified in Table B in the First Schedule	Sub-section (1) of section 249
	(7) Fixation of a fee lower than five rupees in connection with registration of documents by a foreign company	Sub-section (8) of section 277 1
	and † (8) Permission to banking companies to engage in business other than those specified in clauses (1) to (17) of section 277F	Sub-section (2) of section 277G

It will be seen from this statement that the delegation of powers has, in the process, automatically involved the transfer of several important duties to the State Governments. Thus, for example, the duties imposed by the legislature on the Central Government by such important sections as section 137 (power of the Registrar to call for information or explanation from a company), 138 (investi-

* Auditor's Certificates Rules were framed in 1932 to provide for the matters indicated in sub-sections (1), (2), (2A) and (2B) of section 144. These rules have been replaced by the Chartered Accountants Act and the Regulations framed thereunder, and the above sub-sections of Section 144 of the Indian Companies Act have also been substituted by section 33 of the Chartered Accountants Act

gation of the affairs of a company through inspectors), 144(4) (appointment of auditors by Government in certain circumstances), 166 (aa) (11) (presentation of a petition to the Court for winding up by a Registrar), 237(3) (prosecution of delinquent directors) and 248 (registration offices) are now all performed by the State Governments

Reasons for
the delega-
tion

246 The reasons for such extensive delegation of authority are partly historical, partly constitutional and partly financial. It is only recently that the doctrine that the State must have an economic policy, *i.e.*, that it will be held responsible and must, therefore, necessarily concern itself with the general state of economic health of the country has been recognised in this country. In the absence of any such positive recognition of the responsibilities of the State, the full social implications of company law were hardly realised and the administration of the Act was regarded primarily as the negative function of preventing the joint stock companies from contravening its statutory requirements. This negative function could be performed as easily by the Provincial Governments as by the Central Government. The constitutional bias in favour of using the then Provincial Governments as agents of the Central Government, which coloured administrative policy in this country for well over half a century, further favoured the decentralization of the administration of the Companies Act, while the need for observing 'economy' in administration could be always cited as a good argument for using the agency of the Provincial Governments for the discharge of the duties and responsibilities, which attached to the Centre and for delegating to the former more and more of the functions of the latter. Under these administrative arrangements, the Registrars of Joint Stock Companies became essentially filing Registrars, working under the general control and supervision of the State Governments. Although, as stated above, the power to appoint Registrars under section 248(2) of the Indian Companies Act has been delegated to the State Governments, the latter do not, in practice, make such appointments or fix or revise the terms of their appointment, except with the prior approval of the Central Government. Except for this limited measure of control exercised by the Central Government, the Registrars and their staff are under the direct administrative control of the State Governments, although the entire cost of the establishment is borne by the Central Government. It may be mentioned in this connection that very few States have full-time Registrars. Only the States of Bombay and West Bengal have whole-time Registrars with separate staff attached to them for the administration of the Indian Companies Act. In all other States, the Registrar's duties are performed by officers of the State Governments, with or without any separate staff to enable them to discharge these additional duties. The table below will show the staff at the disposal of the Registrars in the different States

Place	Description of post	Sanctioned strength as on 1-9-50			Actual strength as on 1-9-50]
		Permt	Tempy	Total	

Offices of the Registrars of Joint Stock Companies

Bombay	Gazetted	1	1	2	35	2
	Non-gazetted	10	23	33		33
West Bengal	Gazetted	2		2	42	2
	Non-gazetted	32	8	40		40
Madras	Gazetted	1		1	38	1
	Non-gazetted	18	19	37		37
U P	Gazetted				14	
	Non-gazetted	7	7	14		14
Punjab	Gazetted		1	1	11	1
	Non-gazetted	7	3	10		10
Madhya Pradesh	Gazetted				4	
	Non-gazetted	2	2	4		4
Orissa	Gazetted				4	
	Non-gazetted	1	3	4	10	4
Assam	Gazetted				10	
	Non-gazetted	5	5	10		10
Bihar	Gazetted				5	
	Non-gazetted	2	3	5		5
Ajmer-Merwara	Gazetted				2	
	Non-gazetted	1	1	2		2
Delhi	Gazetted				8	
	Non-gazetted	2	6	8		8
Coorg	Gazetted				1	
	Non-gazetted	1		1		1
Hyderabad	Gazetted	1		1	17	1
	Non-gazetted	16		16		16
Mysore	Gazetted				13	
	Non-gazetted	13		13		13
PEPSU	Gazetted				4	
	Non-gazetted	4		4		4
Madhya Pradesh	Gazetted	2		2	21	2
	Non-gazetted	12	7	19		19
Saurashtra	Gazetted				5	
	Non-gazetted	5		5		5
Travancore and Cochin	Gazetted				18	
	Non-gazetted	13	5	18		18

West Bengal and Bombay—Wholetime Registrars and Assistant Registrars

Punjab, Delhi and Madras—Wholetime Assistant Registrars

In other States—The work is attended to by the officers of the State Government on part-time basis. Only some payments are made to them for the service rendered by their officers.

Source from which expenditure is met—Central Revenues

Budget grant for 1950-51—Rs 4,80,000

Additional
duties en-
trusted to
Registrars in
States

247 Almost every Registrar of Joint Stock Companies appointed under the Indian Companies Act, even where the office is held by a whole-time officer, is required to perform in addition to his duties under the Indian Companies Act, several other functions on behalf of the State Governments or the Central Government in connection with other related Acts. Thus, the 'Registrar' visualized in the Societies Registration Act, 1860, is no other than the Registrar appointed under the Indian Companies Act. Although the Societies Registration Act, 1860, is an item in List II—State List, of the Seventh Schedule to the Constitution, the functions required to be performed by the Registrar under this Act are discharged by whosoever is for the time being acting as the Registrar of Joint Stock Companies. Again, the Registrars of Joint Stock Companies in most States are also Registrars of Firms under the Partnership Act, the administration of which is also the responsibility of State Governments, as the item of 'Partnership' is included in item 7 of List III, Concurrent List, of the Seventh Schedule to the Constitution.

Financial arrangements

248 The financial arrangement between the Central and the State Governments is broadly as follows. The full cost of the establishment of the Registrars of Joint Stock Companies is borne by the Central Government. Where there are no whole-time officers specially appointed as Registrar of Joint Stock Companies, the entire cost of any establishment employed on the work of registration, etc., of joint stock companies and a part of the cost of the officer or officers who perform the duties of Registrars under the Act are recovered from the Central Government. The expenditure incurred in connection with the administration of the Societies Registration Act, 1860, and the Indian Partnership Act, 1932, is generally borne in the first instance by the Central Government to be adjusted later under a scheme of allocation of expenditure in respect of common agencies employed.

Receipts &
expenditure
relating
to adminis-
tration of
Indian
Companies
Act

249 We give below a statement showing the receipts and expenditure under the head 'Joint Stock Companies' since 1947-48

Statement showing Receipts and Expenditure under "Joint Stock Companies" by the State Governments for the Four years Commencing with 1947-48

Note —Under 'Receipts' actual receipts and under 'Disbursements' budget grants have been shown

Serial No	States	1947-48		1948-49		1949-50		1950-51		Remarks
		Receipts	Disbursements	Receipts	Disbursements	Receipts	Disbursements	Receipts	Disbursements	
1	Assam	17,977	15,000	17,071	16,000	16,766	21,000	10,615	17,000	
2	Bengal/West Bengal	4,31,123	90,000	3,73,693	99,000	2,49,317	1,00,000	2,16,480	91,000	
3	Bihar	18,931	17,400	16,422	17,500	6,723	17,600	12,427	18,200	
4	Uttar Pradesh	70,585	28,000	55,239	28,000	40,300	33,000	35,443	31,000	
5	Punjab/East Punjab	41,076	24,000	42,869	22,000	24,272	25,000	20,419	22,000	
6	Central Provinces and Berar/ Madhya Pradesh	15,792	6,000	19,101	7,000	30,248	6,000	12,450*	6,000	*for half year ending 30th September 1950
7	Bombay	2,66,665	59,000	4,43,566	58,000	2,28,088	75,000	1,89,795	80,000	
8	Madras	2,02,258	53,000	1,49,192	85,000	1,60,934	81,000	1,30,427	72,000	

Need for centralization of administration

250 We have attempted to explain at some length the present machinery for the administration of the Indian Companies Act, because it is only after a full appreciation of the existing set up that it is possible to formulate proposals for its improvement. The historical reasons which underlay the decentralization of the administration of the Indian Companies Act no longer exist. On the contrary, the fact that the Central Government are now primarily pre-occupied with economic policy, as much in the private as in the public sector, makes it incumbent for them to take over the administration of the Indian Companies Act. For, as we have already endeavoured to explain in Chapter II of our Report, the working of joint stock companies has a very close bearing on the economic development of the country, and it is futile to try and plan the development of the private sector of the country's economy without being in close and constant touch with the developments that take place in company formation and management. It is not possible for State Governments to take that comprehensive view of the economic terrain which the Central Government alone can. In any case, the necessity for a uniform policy calls for uniform administration of the instruments of that policy.

Secondly, the constitutional factors, which favoured decentralization of administration in the past are no longer operative. The compelling requirements of a positive economic policy have already induced the Central Government to build up suitable organizations for the administration of many complicated subjects in the economic field, and if the administration of the Indian Companies Act is not to be kept divorced from the working of these other economic institutions, it will be essential for the Central Government also to assume responsibility for the administration of this Act. Very few State Governments have any intimate contact with the specialised terrain served by these complicated economic organizations, and can hardly be expected to take any lively interest in the administration of the Companies Act, with which they have so little to do in its other related aspects.

(Page 328
of the
Annexure)

Lastly, the financial argument, which in the past induced the Central Government to transfer their powers and duties to State Governments can hardly stand scrutiny in the light of the figures of receipts and expenditure relating to the working of joint stock companies which we have cited above. In any case, if, in the interests of the purposive development of the private sector of the country's economy, it is considered essential that the administration of the Indian Companies Act should be brought under Central control and direction, no argument about 'economy' which would be demonstrably misleading in this case should stand in the way of the acceptance of this proposal. The additional cost of any central organization and the

strengthening of the establishment of the Registrars concerned can be easily met, if necessary, by suitable adjustments in the scale of fees leviable under the Indian Companies Act. In the course of the evidence before us, the representatives of the business community as well as the general public left us in no manner of doubt on this point. We feel sure that any additional resources that may have to be raised for the establishment of an adequate administrative machinery would be readily available, provided Government made it clear beyond doubt that such resources were needed for the purpose of setting up an efficient and adequate central organisation.

Outlines of the scheme of administrative reform

51 The main directions in which, in our view, the machinery of administration would have to be reorganized are as follows —

- (i) the offices of the Registrars should be suitably strengthened by the appointment of whole time Registrars in all areas. For this purpose, it may be necessary to group a number of States under one charge. In the proposals that we formulate in the next Chapter, we visualize that the country should be divided into a number of suitable regional units, each in charge of a whole time Registrar, assisted by Additional or Assistant Registrars as the case may be, wherever necessary,
- (ii) the Registrars should carry out the functions statutorily imposed on them under the Act. Their services may, however, be utilised by the proposed Central Authority for such administrative duties as that Authority may wish to entrust to them. We recommend that ordinarily they should be lawyers or accountants of adequate standing and experience,
- (iii) in order that the Registrars can discharge their duties effectively, it will be necessary to raise the status of their office appropriately, so as to attract the right type of men to fill them,
- (iv) the administration of the Indian Companies Act together with the establishment of the Registrars should be under the general control and direction of the Central Authority,
- (v) a Central Authority on the lines of the proposal which we elaborate in the following Chapter should be set up as a statutory body under the Indian Companies Act for the purpose of controlling and supervising the administration of the Act and for other related purposes which we explain in the next Chapter.

CHAPTER XVII

A SCHEME FOR A CENTRAL AUTHORITY

The case for a Central Authority

252 In the previous Chapter, we have argued the case for the centralisation of the administration of the Indian Companies Act, and indicated the broad lines on which the reorganisation of the administrative machinery should take place. In this Chapter, we propose to elucidate the arguments for the establishment of a Central Authority for the administration of the Indian Companies Act and allied matters and to explain its structure and function.

Need for a
Central
Authority

253 As we have stated in the previous Chapter, the need for a Central Authority to direct and supervise the administration of the Indian Companies Act is now strongly felt in this country. The traditions of *laissez faire*, which dominated the general attitude of Government in this country as in the United Kingdom, towards the working of joint stock companies ruled out any other form of interference in their working than the statutory restrictions imposed on them in the Indian Companies Act. It may be that the comparatively high standard of management, displayed by the majority of these companies, precluded the necessity for establishment of any statutory or departmental organization to control or supervise their activities. The Great Depression of the 1930's brought about a rapid change in the traditional attitude of the State towards economic matters although in this country, it was not till the beginning of World War II, that the first signs of any positive policy towards the private sector of the country's economy were visible. The steady deterioration in the standards of company management during the years of depression was followed by a rapid decline in the war and post-war years, and the need for continuous watch over the working of joint stock companies was for the first time recognised as a matter of urgent practical policy.

Justification
for a Central
Organisa-
tion

254 It is now widely recognized that the need for an organization for continuously watching the activities of joint stock companies arises, principally, for the following reasons —

- (i) first, the law can function only through the formulation of precise definitions—definitions not merely of concepts or categories, but also of conditions or circumstances in which certain provisions would be applicable, while in others they will have no relevance. Unfortunately, no definition, however well-drafted, can comprehend the multitude of characteristics that really

matter while the characteristics that matter may themselves vary from case to case. The intention of the law may thus be frustrated, both because it is often impossible to include all relevant examples or types, without at the same time including examples and types in which the law is not interested, and also because astute lawyers can evade the law by superficial changes, which leave the real character of a transaction unaffected. The point may be illustrated with reference to certain provisions of the Indian Companies Act on which we have had to comment in course of our Report. Thus, section 87H of the Indian Companies Act was inserted by the Amending Act of 1936, with the definite object of preventing persons, who were in the position of managing agents, and, as such, had control over the whole affairs of the companies under their management, from carrying on any other business in rivalry with the business of the managed company. While the intention of the legislature was clear enough, it was difficult to define precisely and comprehensively two significant concepts and categories, embodied in the phrases "on his own account" and "business which is of the same nature as, and directly competes with the business carried on by a company." This difficulty, as we have seen, led to considerable abuse of the provisions of this section. In the redraft of this section which we have prepared we have attempted to reduce the possibilities of such abuse in future to a minimum. Nevertheless, we can visualise cases, where our intentions may be frustrated by superficial changes in the management of the competitive business or in its nature. It is only a competent organization duly equipped with men and authority that can, by the exercise of its powers of investigation into the ownership of shares of a company, bring out the real character of the management of the competitive business. Similarly, in regard to holding and subsidiary companies, we recognize that the definitions that we have suggested may not be wholly satisfactory. For, the real determinants in the case of such companies are common control and common purpose, but they may be secured in a variety of ways, which may not be readily comprehended within the terms of the provisions that we have recommended on this subject. Here also, detailed investigation into the ownership of the shares of the companies concerned can alone disclose their true character and such investigation can be carried out only by a properly constituted and organized authority,

- (ii) secondly, it follows from the above argument that, while the company law must necessarily frame definitions of concepts, categories and the relevant conditions and circumstances in more or less general terms, leaving the applicability of such definitions to marginal cases to be determined by an appropriate authority, powers that also be vested in such authority to relax, in suitable cases, those provisions of the Act or of the regulations, where absolute rigidity in application might easily do more harm than good. It is not possible for the law to prescribe in advance what these relaxations should be. Only an appropriate authority can, in the light of its knowledge and enquiries indicate what relaxations should be permissible,
- (iii) thirdly, it is now generally recognized that law is not a sufficiently flexible instrument of control or correction, especially in economic matters. The history of company law in this country shows how the amendment of Indian Companies Act has always lagged many years behind current practices in company formation and management. The Amendment Act of 1936 could have been enacted with advantage at least fifteen years earlier, while the present Committee might have been set up perhaps seven or eight years ago. Many of the abuses and malpractices discussed in our Report have been in existence for at least eight or ten years, and were legally possible even under the Amendment Act of 1936. We hasten to add that this is no reflection on either the legislature or its advisers. It only demonstrates the fact that the law can only provide against abuses, which have already appeared and are widespread, that the law which is appropriate to one set of circumstances becomes out of date when these circumstances change, and that it is not beyond the wit of men to circumvent the law. The weary task of reform must, therefore, begin from where it has ended. It is only an appropriate organisation, whose function is to maintain a close watch over the working of joint stock companies, that can oversee the operation of the Companies Act and can keep track of new tendencies and developments, and recommend suitable changes in the existing law either to nip the growing evils in the bud or to remove hampering restrictions,
- (iv) fourthly, even the most well-conceived and well-designed of laws is liable to become ineffective and to fall into disrepute, if there is no regular machinery for making any use of it. As we

have already seen, the defects of the present administration of the Indian Companies Act arise largely from this fact. The provisions of the Indian Companies Act relating to prospectuses illustrates the point. Section 92 contains the requirements of the Act about the filing of a prospectus with the Registrar of Joint Stock Companies. It will be accepted by him for registration, if it satisfies the conditions enumerated in this section, viz, that it should be dated and signed by every person, who is named in it as a director or a proposed director of the company or by his authorised agent. As soon as the prospectus has been filed for registration, it may be issued to the public. There is no obligation on the Registrar or any other authority, including the Capital Issue Controller, to scrutinise it with the result that the specific requirements of section 93 are often more honoured in the breach than in their observance. It is true, that it is open to the directors and the shareholders to go through a prospectus and if they find that it does not comply with the provisions of section 93 to invoke the aid of the law, and to bring the promoters to book. It is, however, extremely unlikely that any member of the management, whether a director or a managing agent, would be so moved by a sense of duty or public service as to complain against the misdeeds or mal-practices of their colleagues, while shareholders as a class would rarely evince any lively interest in the affairs of a company, even if in some cases they did, not only would they often find it difficult to ascertain the facts, but also to combine for the purpose of taking such remedial action as the Companies Act may provide. It is only a duly constituted Authority, entrusted with the responsibility for the administration of the Act that can undertake such a task methodically and systematically,

- (v) fifthly, there is one special factor which we have to take into account in this country, viz, the general lack of financial knowledge and alertness on the part of investors and the general public. As one experienced commentator observes

“In most foreign countries, the press plays a very important role, by reserving separate columns for news relating to finance and company matters and engaging specialists on the staff of newspapers to deal with the subject. In our country, on the other hand, it is only recently that some newspapers are having a

financial column and the part that the daily press plays to provide the public such information as will make them tolerably familiar with matters of finance and economic interest is negligible. These facts necessitate the constitution of an authoritative body to keep a continuous watch over company promotion and company management”*

We fully endorse these observations and consider the absence of a competent and independent financial press is an important additional reason for the establishment of an appropriate Central Authority to keep under review the developments in company formation and management that take place from time to time

Some foreign precedents

Board of
Trade func-
tioning as
central
authority
in U K

255 We think we have said enough to justify the establishment of a Central Authority for the administration of the Indian Companies Act. The need for Central control and supervision of the working of joint stock companies has been felt in almost all advanced countries of the world. In the United Kingdom, the Board of Trade functions as such an authority, and one experienced commentator, who has been closely connected with the working of joint stock companies in that country observes as follows —

“In the United Kingdom, a central administration has always been necessary. The Registrars were what their title denoted, registrars and little more. Their job was to register the documents which the law required the companies to file with them and to see that they were filed. This does not mean that it is not the duty of the Registrars to examine documents filed with them to see that they comply generally with the provisions of the Act. But the examination is not meticulous and it is certainly not their duty to examine the accounts of companies which are filed. Policy lay with the department at headquarters***. If the Indian Government desire to strengthen the Indian Companies Act, it seems desirable to create a central department which would be generally responsible for the sort of policy matters referred to above and would be able to give any necessary directions to the Registrars.” (a)

* Extracts from the record of a statement made to Committee by Shri C. S. Rangaswami, Editor, the Indian Finance

(a) Extracts from a note by Mr. E. V. H. Marker, C.B., Under Secretary, Board of Trade, London

256 In the United States of America, the functions of the Central Authority that we visualise have been performed, for many years, by the Securities and Exchange Commission, which was created under its organic Act, the Securities Exchange Act of 1934, for the purpose of administering that Act and the Securities Act of 1933 which had been hitherto administered by the Federal Trade Commission. The scope of duties and the powers of the Commission have been extended in many directions by a series of federal enactments, the more important of which were

Functions of the Securities and Exchange Commission in U S A.

- (i) the Public Utility Holding Company Act of 1935
- (ii) the Trust Indenture Act of 1939
- (iii) the Investment Company Act of 1940 and
- (iv) the Investment Advisers Act of 1940

In a note set out in Appendix IV of our Report, we have briefly described the duties and the powers of the Securities and Exchange Commission of the United States of America

The structure of the proposed Central Authority

257 There are two ways of organising the Central Authority that we propose —

Type of organisation proposed (Pages 327 and 328 of the Annexure)

- (i) there may be a Central Department dealing with joint stock companies (and, if necessary, with related institutions, e.g., banks, insurance companies, stock exchanges etc) analogous to the corresponding organization under the Board of Trade with local Registrars working in the regions entrusted to them, or,
- (ii) there may be a Central Statutory Authority, with the regional offices in charge of local Registrars under its control and guidance

We have carefully considered which of these two types of organization would be suitable to this country. A great majority of witnesses, who appeared before us, favoured a statutory authority created under the Indian Companies Act, in preference to a purely departmental organization. Each of these types has its advantages and drawbacks. While a departmental organization will be simpler to work, a statutory authority will create more confidence and possess more elasticity and initiative. We are, therefore, strongly in favour of a statutory authority for this purpose. This does not mean that the Central Authority would function in isolation from the main currents of economic policy, that may be adopted by the Government of the day. Clearly, major issues of economic policy relating to the private sector of the country's economy, in

so far as they bear on the working of joint stock companies must ultimately be matters for Government, although we visualise that the Central Authority along with others would be closely connected with the formulation of such policy in its formative stages. But, once these issues of economic policy have been settled, and embodied in legislative or executive decisions, the application of the accepted principles to individual companies, whether in respect of their formation or working should, in our view, be the responsibility of a quasi-independent authority which will examine the technical problems involved, in as detached a manner as possible and be guided solely in this regard by the general directions given to it in an Act or in a recorded executive decision of Government as a whole. It is only in this way it can maintain its independent character, avoid suspicion of bias or partisanship in the discharge of its functions.

Corporate
Investment
and Admin-
istration
Commission
(Pages 327
and 328
of the
Annexure)

258 We suggest that the statutory authority may be called "The Corporate Investment and Administration Commission", and should be located at the headquarters of the Central Government. We have suggested this name because we wish to focus attention on two major aspects of the Commission's work. We shall presently describe the functions and the duties that we propose to entrust to the Commission, but may anticipate our recommendations on this point by pointing out that in our view, the functions of the proposed Commission should be not merely the administration of the matters that arise out of the working of joint stock companies under the Indian Companies Act, but should also include the maintenance of a close and continuous watch over the investment market from the earliest stage of the promotion of a company to its management and final dissolution. These comprehensive functions should, we think, be reflected in the Commission's name.

Status and
composition
of the Com-
mission

259 As regards the composition of the Commission, we suggest that it should consist of a Chairman and not more than four members, but powers should be taken in the Statute to increase the number, if necessary. There should also be power to co-opt assessors or advisers for particular purposes.

The Commission should be a high-power body, and the qualifications and standing of the Chairman and the members should be such as to inspire general confidence. We are opposed to representation of particular interests or regions on the Commission, and would emphasise that the Chairman and members should be selected primarily on the basis of their competence for the functions which they have to perform, together with their standing in the service, profession or other occupation in which they may be engaged. For this purpose, it would be necessary to remunerate the members of the Commission adequately, and it is our considered view that no misleading analogy

of Secretariat scales of pay should deter Government from fixing such terms and conditions of service for them as would attract the right type of men for these offices. Although we are loathe to be more specific on this subject, we suggest that the membership of an organisation of the type which we visualize should consist of men of appropriate status and standing who should among them combine suitable administrative experience, practical knowledge of company law acquired as a practising lawyer and knowledge of company finance and accounts gained as Chartered Accountant.

The usual disqualifications enumerated in statutes of this type should be attached to the membership of the Commission. In particular, we would suggest that the members, on their appointment, must disclose the nature of their interest in any private undertaking either as share holders or otherwise, and on relinquishment of office should be debarred from holding any office or place of profit, in any private industry or undertaking for a period of three years, without the consent in writing of the Central Government. We would note that a similar condition was recommended by the Fiscal Commission for membership of the permanent Tariff Commission, and the recommendation was accepted by Government and has since been embodied in section 6 of the recently enacted Tariff Commission Act, 1951.

Functions of the Commission

260 As regards the functions of the Commission, we consider that they should be as follows —

- (1) the Commission should carry on such functions as may be entrusted to it under the future Indian Companies Act. In particular these will include—
 - (a) the powers of inspection and investigation which we have recommended on the lines of sections 164 to 175 of the English Companies Act, 1948,
 - (b) the powers and duties arising from the accounts provisions of the Indian Companies Act, including in particular such matters as the appointment of auditors, where none have been appointed, the postponement of presentation of accounts, the holding of meetings and the like, exemptions to be granted to directors and others in regard to disclosure of particulars, etc.,
 - (c) the supervision of winding-up proceedings, where this authority is conferred on it under the statute,

- (d) the study of balance sheets and profit and loss accounts of companies, with a view to determining to what extent they conform to the requirements of the Indian Companies Act in this behalf,
- (2) the Commission should also keep the investment markets in the private sector of the economy under continuous observation. It should also undertake a systematic study of prospectuses, of the terms and conditions of new issues of capital of company accounts and of qualified reports by auditors of companies and bring to the notice of Government any new trends in company management that might require their attention. One important aspect of these studies would be concerned with researches in corporate finance,
- (3) the Commission should also carry on such other functions relating to capital issue control, regulation of stock exchanges and any other subject connected with the promotion and formation of joint stock companies, which the Central Government may delegate to it. Witnesses were generally in favour of the transfer of capital issue work to the proposed Central Commission. At present the Government of India have no adequate organisation for dealing with this subject. Although companies, which apply for sanction to an issue of capital, have to answer a long questionnaire, in which information is sought on several aspects of the proposed issue, in practice not only is such information usually very sketchy, but even the meagre facts that are supplied are subjected to no very close scrutiny. This is not surprising, for the department concerned is hardly equipped to deal adequately with this important subject. The present arrangements do not seem to recognise the basic fact, that it is not enough merely to approve of the purpose for which a new issue is ostensibly floated, such approval may, on occasions, indeed prove to be misleading and embarrassing. What is really more important is a competent scrutiny of the form and the terms and conditions in which the issue is proposed to be made, so that the benefits and burdens that may be imposed on the promoters on the one hand and the company on the other are fully laid out, in order to enable a correct assessment being made of the worth of the proposed issue by prospective investors. It follows that capital issue work can hardly be kept away from the authority responsible for supervising the promotion and formation of

joint stock companies In a note addressed to us by the Controller of Capital Issues, it was argued that as capital issue control was now being utilised to control foreign capital investments in India's industries, and to correlate Government's loan programme with the timing and form of borrowings by public limited companies through debentures etc it was difficult to transfer this work to any Authority outside the Government of India This objection seems to us to be based on a misconception Clearly, the principles relating to foreign investments are or must be well-defined, and if, in any particular case any deviation from the general principles is required, Government can always issue necessary directions to the Central Authority We are, therefore, unable to see how the control of foreign investments in India's industries would be materially affected by the transfer of capital issue work to the proposed Central Authority As regards the other point—correlation of Government loans with the borrowings of public companies—even here, Government should be able to formulate their views in advance, with reasonable precision and firmness and then communicate them to the proposed Central Authority which will no doubt give due consideration to them As we have already said, it would be impossible for the Commission to function in isolation from the main currents of economic policy and administration and indeed its usefulness and efficiency would be greatly impaired if it did so That is one reason why we have suggested its location at the headquarters of the Government of India We do not, therefore, see any administrative difficulty in integrating capital issue control, with the other functions that we propose for the Central Commission

We would point out in this connection that in the Bill for the Development and Control of Industries as reported upon by the first Select Committee there was a provision for the creation of an Industries Board and it was proposed that the functions of the Controller of Capital Issues relating to the scheduled industries should be transferred to this Board (*vide* para 22 page 156 of the Planning Commission's Draft Five Year Plan) The second Select Committee, however, did not approve of the scheme of an Industries Board with the result that the Planning Commission's proposal for transferring capital issue work to the Industries Board in so far as scheduled industries are concerned was not proceeded with If the Planning Commission would approve of the principle of the transfer of capital issue control to a body like the Industries Board,

there can be hardly any objection to the transfer of the activities of the office of the Controller to the proposed Central Authority

- (4) Matters relating to the stock exchanges in England are dealt with in the Board of Trade, while the Securities Exchange Act of 1934 places the National Securities Exchanges as well as the over-the-counter markets in the United States of America under the general control and guidance of the Securities and Exchange Commission. The regular members of the former are subject to the close supervision of the Securities and Exchange Commission, while the brokers and dealers engaged in over-the-counter securities business are required to register with it and to ensure that their business activities conform to certain prescribed standards of conduct. Transactions in the stock exchanges are in some respects so closely connected with the management of joint stock companies, that it would be a great advantage if the responsibility for the control and supervision of both these types of institutions is entrusted to the same authority. In this view, we suggest that the functions proposed for the Stock Exchange Commission in the report of the "Committee on proposed legislation for the Regulation of Stock Exchanges and Contracts in Securities" may be conveniently entrusted to the proposed Central Authority. For this purpose, if necessary, the membership of the Commission may include a person of sufficient status and standing generally familiar with the working of the stock exchanges in this country.
- (5) One important task of the Commission would be in course of time, to build up a cadre of trained technical and administrative staff competent to analyse and study prospectuses, company accounts—and problems of investment finance. It should also be the duty of the Commission to provide the technical personnel needed for the regional offices and arrange for the post-entry training of all such technical and administrative staff.

Field Organisation

261 In the previous Chapter, we have commented on the unsatisfactory arrangements for the field organisation under the Indian Companies Act in all states except Bombay and West Bengal. The present system of part-time Registrars of Joint Stock Companies, in all other States, does not ensure adequate supervision over the working of joint stock companies, and must, in our view, be replaced

by a system of whole-time Registrars, who, along with the existing whole-time Registrars in Bombay and West Bengal, should be placed under the direct control and supervision of the Central Authority. We recognize that many of the States may not have enough work for whole-time Registrars of Joint Stock Companies of sufficient standing. It is, therefore, necessary that the country should be divided into a suitable number of regions, which would enable the employment of whole-time Registrars and adequate staff to support them. We trust that the division of India into suitable regional groups will achieve the objects that we have in view. The Registrars in charge of the regional organisations will carry on the functions of the present Registrars of Joint Stock Companies and such other functions as the proposed Central Commission may require them to undertake from time to time.

Reports, returns, etc., to be submitted by the Central Commission

262 We recommend that the proposed Central Authority should prepare an annual report on the working of joint stock companies in India, and on such other activities as may be entrusted to it by the Central Government and that a copy of this report should be laid before both the Houses of the future Parliament. Section 451 of the English Companies Act imposes a similar obligation on the Board of Trade. We further recommend that the powers conferred on the Board of Trade by sections 452 and 453 of the English Companies Act should be vested in the Central Authority. We also suggest that the Authority should have the power to amend the regulations in Table "A" except those that are compulsory. As regards these compulsory regulations, as they have the same degree of validity as sections in the Indian Companies Act, it will be of advantage to incorporate them as specific sections of the Act itself. We recommend that this be done. In that case, the future Table "A" will consist only of optional regulations, all or some of which may be adopted by the articles of association of a company, and the same process of law will apply to the amendment of the compulsory regulations as now apply to the sections of the Act.

263 We have not considered it necessary to estimate the cost of the proposed Central Authority but we do not think that this will present any difficulty. As we have already said in paragraph 250 public opinion would readily support any action to revise the scale of fees laid down in Table "B" of the Indian Companies Act, should Government consider it necessary to do so for the sole purpose of building up an adequate and competent central organisation for its administration. We, therefore, recommend that Government should work out the details of the scheme and take such action as they consider necessary to find the finances required for it.

Cost of proposed Central Authority to be met by revising scale of fees, if necessary

CHAPTER XVIII

COMPANY STATISTICS

Need for
systematic
compilation
and analysis
of company
statistics

264 In Chapter II of our Report, we referred in passing to the paucity of data relating to the working of joint stock companies, which prevented an adequate statistical assessment of their role in the economy of the country. In Chapter XI we commented on the manner in which company accounts should be presented and on their contents. In Chapter XVII we indicated that one of the important duties of the proposed Central Authority would be to study company statistics and to keep a close watch on the investment market in the private sector. Without the tools provided by detailed study of company statistics, the Central Authority would be unable to perform many of the functions which we have proposed for it. It is, therefore, essential to ensure that these statistics are properly designed systematically tabulated and compiled and methodically analysed. This will be one of the important tasks that will face the Central Authority soon after its constitution. In this Chapter we propose to survey the existing state of company statistics in this country and to examine the principal directions in which they require improvement.

Nature of company statistics

265 Company statistics may be conveniently divided under three broad heads —

- (i) the registers and returns which are required to be maintained at a company's office,
- (ii) documents which a company is required to file with the Registrar of Joint Stock Companies other than the financial statements,
- (iii) financial statements relating to the working of a company which for convenience sake we call company's accounts.

The books and registers which are required by the Indian Companies Act to be kept at a company's office are as follows

	Sections
Register of members with particulars mentioned in section 31	31 & 36
Index of the names of members	31A & 36
Annual list of members and summary to be contained in a separate part of the register of members	32 (3)
Transfer of shares	34
Duplicate of the British register of members	42
Minute Books of general meetings and directors' meetings	83
Register of directors and managers and managing agents	87
Register of particulars of contracts, etc., mentioned in section 91A	91A

	Sections
Memorandum of contract by manager or agent where company is undisclosed principal	91D
Copies of instruments creating mortgages or charges	117
Register of mortgages and charges . . .	123
Register of debenture-holders . . .	125
Books of account	130
Copy of audited balance-sheet for inspection of members	131 (3)
Statement in form G of Schedule III together with a copy of the last audited balance sheet laid before members to be displayed by every banking or insurance company, or a deposit, provident or benefit society	136 (2)

The documents which a company is required to file are many and various. Some of them deal with important subjects connected with the formation, working and liquidation of joint stock companies while others are of a more formal nature. It is unnecessary for us to enclose a list of these documents which can be found in any competent text book on Indian company law. The objects underlying the provisions of the Companies Act, which require the filing of these documents with the Registrar are, first, to ensure compliance with those provisions, and, secondly, to enable the members, and in some cases the creditors, of the company, to study these documents, where facilities for inspection and study are not available in the company's office.

The annual financial statements, relating to the working of companies, stand on a different footing. Although the current attitude towards these statistics, which we have derived from the British practice and tradition, is to regard them essentially as matters for reporting by the management to the members of a company, it is being increasingly recognized, even in Great Britain, that interest in the activities of companies is not confined to members and creditors, but that improved education—political, economical and social as well as academic has increased the desire and capacity for knowledge in those, who may be directly or indirectly interested in the company's steady progress. Following its recognition, the view is gaining ground among the managers of the more advanced companies in that country, that it is advantageous even from the point of view of the companies to satisfy this desire. Indeed, the public interest in company accounts has lately become so pronounced, that in recent discussions on the subject, the necessity for the disclosure of more information in them and their presentation in a standard form has constituted the central theme of company law reforms.

266 In some of the representations on the subject which were made before the Cohen Committee, it was argued that the public interest in company accounts has four general requirements, (a) that they should be full, (b) that they should be true, (c) that they should be made available frequently and promptly, and (d) that, at least in some

**Importance
of company
statistics.**

respects, they should use words in a defined meaning. The shareholders chiefly require ample information and accuracy, those who are concerned with public policy require not only fulness of information but also that it should be presented in a standardized form. In a memorandum submitted to us, the Ministry of Finance made a similar claim when they stated that—

“in order that financial accounts may serve a useful purpose, it is essential that they should give a clear and orderly picture, which can be readily understood, of the operations of an enterprise. A relatively uniform basis of design, common to all financial accounts, will be found necessary, making allowances for different types of industry and for different undertakings within the same industry. This does not, however, mean an imposition by artificial means of a rigid form on all such accounts, but does imply such a minimum degree of uniformity as will facilitate a variety of comparisons”

Although we are in sympathy with the objects underlying these demands, we refrain from making any recommendations on this subject except those which we have already made in Chapter XI of our Report. For, we feel that, till the existing forms of company accounts have been thoroughly studied, and the possibilities of their effective use have been fully explored, it would be premature to load these accounts with further information, of which little use would perhaps be made in practice. When the Central Authority has been established and provided with the necessary technical and administrative staff, we suggest that one of its first tasks should be to undertake a study of the forms of existing company accounts, in the light of our recommendations, and then to consider in what directions they would require further amplification and to what extent they could be effectively standardized. We feel sure that, even within the limits of the law, a great deal could be done to improve the presentation of company statistics and to recast them in a form which would more readily lend themselves to meaningful analysis.

The books and registers which a company has to maintain in its office, and the documents which it has to file with the Registrar, together with its annual accounts, constitute a variety of statistical data, of which very little use has been so far made either for the limited purposes of reviewing the work of joint stock companies or for the much wider purpose of formulating economic policy. The only use of these data has been the preparation of some inadequate statistical returns relating to joint stock companies. In the following paragraphs we briefly indicate the nature of these publications.

Official Publications

267 Statistics relating to joint stock companies in India are available in the following official publications —

Statistical
publications
relating to
joint stock
companies

- (1) *Joint Stock Companies (Monthly)* Issued by the Department of Commercial Intelligence and Statistics, Government of India, Calcutta
- (2) *Joint Stock Companies in British India and the Indian States of Hyderabad, Mysore, Baroda, Gwalior, Indore, Travancore and Cochin—(Annual)* Issued by the Department of Commercial Intelligence and Statistics, Government of India, Calcutta
- (3) *Statistical Abstract, India—(Annual)* Issued by the Economic Adviser, Government of India, New Delhi
- (4) *Monthly Abstract of Statistics* Issued by the Cabinet Secretariat, Government of India, New Delhi
- (5) *Indian Trade Journal—(Weekly)* Issued by the Department of Commercial Intelligence and Statistics, Calcutta

268 Statistics incorporated in this publication relate at present to the States (formerly provinces) of India and the areas covered by the States of Hyderabad, Mysore and Travancore-Cochin as well as Baroda (now merged in Bombay) Regular monthly issue of this bulletin, started in a revised form in April, 1935, was suspended or interrupted more than once and its publication fell so much into arrears at times that omnibus numbers containing only "the essential information on the subject" and covering as many as twenty-seven months in one issue had to be got out, as will be seen from the statement below

Joint Stock
Companies
(monthly)

April 1935 to December 1941—issued monthly

January 1942 to March 1944—issued in 1945 as an omnibus number

April 1944 to December 1944—issued monthly

January 1945 to March 1947—issued in 1949 as an omnibus number

April 1947 to March 1948—issued in 1949 as an omnibus number

April 1948 to September 1948—issued in 1949 as an omnibus number

October 1948 to March 1949 (latest number)—Issued in 1950 as an omnibus number

The issues prior to 1942 contained detailed information relating to companies in "British India" and the "Indian States" of Hyderabad, Baroda, Mysore and Travancore, which were classified in the abstract statements included in the publication under the following heads (with subdivisions in certain cases) —

- (1) Banking, Loan and Insurance
- (2) Transit and Transport
- (3) Trading and Manufacturing
- (4) Mills and Presses
- (5) Tea and other planting companies
- (6) Mining and Quarrying
- (7) Estate Land and Building
- (8) Breweries and Distilleries
- (9) Sugar (including Jaggery) manufacture
- (10) Hotels Theatres and Entertainments
- (11) Other Companies

Three of the abstract statements (which were discontinued after April 1944) provide the following information (indicating the share of each Province or State)

- (a) as regards new companies started during the month the number and capital (authorised, subscribed and paid up), an alphabetical list of such companies for the whole year being included in the issue for March,
- (b) progressive totals beginning from April,
- (c) similar particulars of companies, which, having ceased to work, went into liquidation or were dissolved or otherwise became defunct during the month,
- (d) changes in the capital of existing joint stock companies which were reported during the month (Prior to April 1935, only the aggregate authorised capital and subsequently also the subscribed and paid up capitals were shown)

In addition to the abstract statements referred to above the bulletin contains some detailed statements which give the following information for each month

- I In respect of Companies registered during the month
- (1) the names of companies, serially numbered and classified into the 11 groups already mentioned, the names of the managing agents, secretaries or other officers,
 - (2) situation of the registered office,
 - (3) objects of the company, and
 - (4) the capital—authorised, subscribed and paid-up

- II In respect of companies that, having ceased to work, went into liquidation or were dissolved or otherwise became defunct during the month
- (1) name
 - (2) date of registration
 - (3) the three classes of capital
 - (4) the date of going into liquidation and
 - (5) the date of final dissolution
- III Changes in the membership/(three classes of) capital of existing companies reported during the month
- (1) name,
 - (2) date of registration,
 - (3) date of increase or decrease of capital/membership,
 - (4) the capital/membership before change,
 - (5) the capital/membership after change, and
 - (6) the difference between (4) and (5)

The combined issues contain information regarding the total number and capital of companies registered as well as of companies that ceased to work each month during the period covered. The share of each Province or State is indicated in both the tables. The classification of companies under different heads has however been omitted. An alphabetical index of names of joint stock companies limited by shares, registered during the period is appended to the publications.

269 Upto 1918-19 the publication contained figures for British India and Mysore State only, Baroda, Gwalior and Indore being added to it in 1919-20, Travancore in 1920-21, Hyderabad in 1921-22 and Cochin in 1935-36

Joint Stock
Companies
in British
India and
certain other
Indian
States
Annual

In each issue figures are given for ten years regarding—

- (i) the number of companies at work in each Province and specified Indian States, together with their aggregate authorised, subscribed and paid up capital at the end of the year. The classification of the companies followed in the monthly publication mentioned above is adopted also in this annual issue. The total number of companies which were wound up, discontinued or which were registered but did not commence business is also shown. The number of companies registered since the laws relating to registration became operative can be deduced from the figures given,
- (ii) the number and capital of new companies registered during the year in each (British Indian) Province, centrally administered area and specified Indian State. The total number of companies which were wound up, discontinued or which never commenced business is available,
- (iii) the number, description and capital of companies which ceased to work during the year,
- (iv) the number of companies incorporated outside India but working in India during the year. The

authorised, paid up and debenture capital of such companies is shown in pounds-sterling

The publication also provides a useful alphabetical list of companies at work in India on the last day of the year. Private companies and those incorporated outside but working in India can be easily distinguished from the rest. The list contains particulars regarding the date of registration, situation of the registered office and the capital (authorised subscribed and paid up) of each company. The figures relating to the paid up capital are, however, not necessarily upto date in every case as they are based on such information as is available in the Registrars' offices on the date of preparation of the list.

The publication of this series was suspended during World War II, only the issue relating to 1938-39 being published (in 1944) during this period. In 1948, "with a view to overtaking the arrears in the publication and in the interest of paper economy", a combined issue containing information for four fiscal years 1939-40 to 1942-43 was brought out. For similar reasons the issues relating to the next three years 1943-44 to 1945-46 were combined together in a single volume issued in 1950. During the same year another issue, the latest in the series so far, relating to the fiscal year 1946-47 was published. With a view to economy in printing, the table relating to the alphabetical list of companies at work in India has been omitted from the 1946-47 volume. This table is, however, to be re-introduced in the volume for 1948-49 with up to date revision of the particulars.

Statistical
Abstract
India
Annual)

270 The publication contains figures relating to the number and paid-up capital of Joint Stock Companies at work at the end of each financial year. The companies registered in each of the British Indian Provinces and certain Indian States are dealt with separately. Information regarding the number of companies registered outside but working in India is also available under broad heads for each Province.

Monthly
Abstract of
Statistics

271 One of the tables in this publication shows the number and paid-up capital of companies at work at the end of each fiscal year since 1937-38. The latest issue (March 1951) contains figures upto March 1948. The number and paid-up capital of companies incorporated and registered as also of companies which ceased to work during each month are shown in another table. Figures upto July 1950 are included in the latest issue. Monthly averages for 1938 and 1945 to 1949 are also shown for comparison.

Indian
Trade
Journal
(Weekly)

272 Monthly figures relating to the number and class and the authorised capital of new joint stock companies registered in Bengal are published in this journal.

Limitation of Statistics relating to Joint Stock Companies in India

273 An examination of the available statistics relating to joint stock companies, shows—

first, that in the tables or the annual alphabetical list referred to above, no entries are made in the cases of a large number of companies in respect of their share capital, presumably because those companies are companies limited by guarantee and unlimited companies which do not have a share capital,

secondly, since companies or associations not for profit need not add the word "Limited" after their names, even where the liability of the members may in reality be limited, they are not readily distinguishable from unlimited companies or those limited by guarantee,

thirdly, that the aggregate figures of authorised, subscribed or paid-up capital shown against the figures relating to the total number of companies should be used with caution in working out the average capital of each unit because the two classes of companies mentioned above are excluded from the figures relating to capital while they are included in the total number, and

lastly, that since the liquidation or winding-up of a company does not immediately follow the cessation of its work, the period of interval between the two processes is sometimes as long as 21 months. Sometimes there are also administrative delays in the process of compulsory liquidation. Moreover, companies may be fulfilling the requirements of the Act and yet not doing any substantial business. This remark applies particularly to private companies as they need not send copies of balance sheets to their members or to the Registrar.

All these facts have to be borne in mind in using the available statistics of joint stock companies. It would be wrong to treat all companies included in the statement relating to "companies at work" as "all actually in operation."

Recommendations of the Inter-Departmental Committee on Official Statistics

274 The Inter-Departmental Committee on Official Statistics appointed by the Government of India in 1945 under the chairmanship of Sir Theodore Gregory drew the attention of the Government to the great delay in publishing the relevant official publications during the last War. Even today the latest detailed figures on the subject are for the fiscal year 1946-47 although certain summary figures for the year 1947-48 have since been published in the *Statistical Abstract* (Annual). There is a clear need for bringing the detailed annual publication up to date as early as possible. The monthly publication mentioned above should also be expanded to the pre-1942 pattern. Useful as these publications are, providing as they do a full list of the companies at work together with details

of their authorised, subscribed and paid-up capital, their utility will be greatly enhanced if they were to include other important details such as block capital, depreciation and profit and loss

In regard to the consolidated tables in the annual publication the Gregory Committee made the following comments, to which we would draw attention —

- (i) the present practice of lumping together all companies irrespective of whether any part of their capital is paid up or not is apt to mislead when derived statistics such as the average paid-up capital of a company are wanted. It suggested, therefore, that the table should be recast so as to show the companies as a frequency distribution with appropriate class intervals based on the paid-up capital,
- (ii) private companies do not publish any balance sheets and if it is desired to study the course of profits in relation to the capital structure of companies as a whole, it will be a great advantage to have such companies separated from the 'public' companies,
- (iii) it also suggested a re-arrangement of the alphabetical list of companies so as to show the classification according to the nature of business, in a manner analogous to that followed in the Large Industrial Establishments in India. Very frequently it is found necessary to draw up lists of companies engaged in a particular line of business and much trouble would be saved for all if the proposed re-arrangements could be made. It was felt, incidentally, that there was a need for a slight reshuffling of the grouping adopted at present in regard to compromise. A break-up of the present 'trading and manufacturing' group was considered essential. Cement, for instance, by itself an important item, has got mixed up with lime and potteries and shipbuilding has been included under iron and steel. It recommended that the whole question should be further considered in detail as soon as possible.

Central
Authority to
examine
question of
statistics

275 We suggest that these recommendations should engage the attention of the Central Authority as soon as it is properly constituted. As we have already said, one of its important tasks would be to study and analyse company statistics not only to assess the performance of the individual companies but also to enable it to keep a close watch on new trends in company management and company investment. The Authority will find it impossible to discharge this task efficiently and adequately, unless it takes steps immediately after its establishment, to re-organize company statistics, in an orderly and intelligent manner.

CHAPTER XIX

CONCLUSION

276 We have given some thought to the form of the legislation in which our recommendations, if accepted by Government, should be embodied. It will be seen from the history of the Indian Company Law which we have traced in Chapter III that the last major amendment of the Act took place in 1936. Several minor amendments were made between 1937 and 1950, but no further comprehensive revision of the Act was undertaken during these years, partly because of the outbreak of World War II and the pre-occupation of Government with other urgent problems and partly because of the preliminary investigations connected with the present enquiry which were under way. Having regard to this fact and the nature of our recommendations, we suggest that if Government accept our recommendations, they should form the basis of a consolidating measure and not merely an amending Bill. The witnesses, who appeared before us, were generally agreed on this point. A consolidating measure will necessarily involve much more detailed work both in the drafting and the legislative stages of the Bill than a mere amending Bill would. But the advantages of such a measure are relatively so great that we suggest that the effort should be made. We trust the Annexure of our Report together with the Addendum attached to it, which fully sets out our detailed recommendations, will be of help to the Parliamentary Draftsman, but if he requires any further assistance, we have no doubt that Government would place it readily at his disposal. We would also emphasise in this connection that our recommendations should be read as a whole, so that if Government are unable to accept any of our recommendations or wish to modify any of them, they should take care to see that their inability to accept such recommendation or their desire to modify any particular recommendation does not neutralise the efficacy of our other recommendations which are dependent on them.

277 It now remains for us to conclude with the hope that our recommendations may achieve the objects of our enquiry. In Chapter II, we have explained at some length our general approach to the question of company law reform. We have followed this up in Chapters IV to XVIII with elucidation of the more important of our suggestions and recommendations which, it will be noticed, fall under two broad heads, *viz*,

- (a) changes in the Indian Companies Act, and
- (b) changes in the organization necessary for the better administration of the Act

As we have emphasised in course of our Report, neither reform of the law nor reorganization of the administrative machinery in itself would bring about any effective improvement in the formation and management of companies, it is only through a combination of both that the desired results can be achieved

278 In so far as changes in law are concerned, our proposals attempt to secure the fullest practicable measure of disclosure of information relating to the activities of companies, and the imposition of such restrictions on these activities as we have considered necessary in the present state of company practice in this country. Some of these restrictions will no doubt appear irksome to business, which is conducted in an efficient and honest manner, but reforms in all fields of group activity must necessarily be based on average behaviour. It is part of the social discipline of our times that institutions, no less than individuals, which are in advance of the average standard, have to submit themselves as much to the rigours of the law as those who are below that standard. Nevertheless we have taken all possible care to see that our recommendations do not impose any unreasonable burden on legitimate business. For, we fully appreciate the fact that if the limited company system is to continue to play its part in our economic structure and if private enterprise is to assist in the economic development of the country, it is essential that there should be some flexibility in the company law, although, as the Cohen Committee pointed out, so long as there is any degree of flexibility in law, the possibility of abuse must exist. In arriving at our recommendations, we have constantly borne in mind the twin objects underlying them, namely, the need for eliminating abuses and harmful practices on the one hand and for providing sufficient flexibility in the law on the other hand. At the same time we have taken care to see that such flexibility in the law as we have provided does not open out easy avenues of escape for unscrupulous managements. We have no doubt in our mind that the inconvenience or hardship that may be caused to some concerns by the enforcement of our recommendations will be more than compensated by a general rise in the standard of management of average business which we expect to follow

from our recommendations We need hardly add that the extent of this rise will depend not merely on sound legislation or vigorous administration of the law, but also to a large extent on the energy, initiative and the practical wisdom of shareholders

C H BHABHA, *Chairman*

M SHANKARAIYA

MOHANLAL L SHAH*

A D VICKERS

J J KAPADIA

PRATAP NARAYAN VAJPEYI

V S KRISHNASWAMY

G P KAPADIA

TRICUMDAS DWARKADAS

S M BASU

S RANGANATHAN

D L MAZUMDAR, *Member-Secretary*

*Subject to a note of dissent on some points

Minute of Dissent of Shri Mohanlal L Shah

I find myself in the unfortunate position of having to append a note dissenting from my colleagues on some aspects of the recommendations contained in the Report which, I consider, are of a material nature from the point of view of the future organisation and functioning of Joint-Stock enterprise in this country. In doing so, I am actuated by a desire to draw pointed attention to the possible consequences of the changes suggested in the body of the recommendations so that the authorities concerned, before deciding to act on those recommendations, may have an opportunity of assessing their implications from an objective stand-point.

I cannot help mentioning that the Company Law Committee worked under a serious handicap in that it was so near, in point of time, to certain adverse developments, even if such developments were confined to some cases, in the organisation and management of joint-stock enterprise in the country which had come in for a good deal of public comment and criticism. No one, naturally, could be left uninfluenced by the pressure of such criticism, with the result that in the desire to prevent a recurrence of incidents of that kind, some of the changes recommended have over-stepped the practical necessities and requirements of the situation. While I am one with my colleagues in the desire to usher in a new era of healthy and clean management of joint-stock enterprise in the country, I may be allowed to point out that the developments and abuses which crept in during the period of the war and immediately thereafter were not so much due to the absence of effective checks or legal powers and remedies in the existing provisions of the law as to the unpreparedness or ineffectiveness of the procedure in administering the provisions as they stood. While I do not wish to burden this note with a detailed reference as to how the authorities could have prevented or checked some of the abuses by invoking and putting into effective use the existing provisions of the law, there is overwhelming support for the point of view that the country is being jockeyed into hasty and panicky legislation in the sphere of Company Law by reason of administrative inaction in preventing chances of abuse in spheres in which they had adequate powers to prevent such abuses. Although, therefore, I feel that a wholesale revision of the Company Law should have been taken into hand under more normal conditions, I am not oblivious to the reaction in public mind caused by the developments during the war period. I am, therefore, conscious of the fact that, if for no other reason, at least to remove the stigma attached to these developments, those interested in the advancement of joint-stock enterprise in the country, should agree to further provisions of a regulatory character. I have examined all the proposals and recommendations in that spirit and in many cases, even if I felt that the proposals were such as to curb, cabin and confine the activities of entrepreneurs in the country, and were more strict than the amendments recommended by the Cohen Committee in the U K, and the Millin Commission in South Africa, I have agreed to them wherever I felt that the ultimate object of the regulation underlying the provisions in question was of a character conducive to the

strengthening of the fabric of joint-stock enterprise. To mention a few instances, I have fallen in line with the views of my colleagues in regard to statutory disclosure in the Balance Sheet of details of investments by reference to the names of companies or undertakings in which such investments are made. I have also agreed to a far-reaching amendment for incorporating provisions similar to those contained in Sections 172 to 175 of the English Companies' Act of 1948 which empower the appropriate authority to investigate the ownership of shares and debentures of specified joint-stock companies under certain conditions. I have again agreed to the proposals requiring publication and filling of the balance-sheet of private companies. Many would consider the changes envisaged in these proposals as something in the nature of unnecessary interference in internal affairs of joint-stock companies not serving a public purpose of an essential character. Nevertheless, as I felt that the changes in their ultimate result cannot do any positive harm, I agreed to the same although I felt the changes were not justified from larger considerations of the future industrial and economic development of the country. Even so, it is my earnest desire that Government might pause and weigh the possible effects of all these proposals. But in respect of proposals or recommendations which, in my humble opinion, are likely, from the long-range point of view, to have contrary results, I shall be failing in my duty, not only to the interests which I represent, but to the community at large, if I do not frankly and categorically state my misgivings and point my finger to the dangers that lie ahead in pursuing a policy of extreme and rigid legislative restriction. As pointed out by the Greene Committee and the Cohen Committee, it would be wrong to impose hampering restrictions on sound business merely to catch a few wrong-doers. It is never possible to stop fraud altogether and it is most important in these difficult times to avoid any action likely to hamper industrial and economic development. Prohibitions and restrictions would hamper honest business while not necessarily checking the wrong-doers, since there is no statutory prohibition which cannot be circumvented by people so minded. As humourously observed by one of my colleagues in the course of the discussions, many of the changes now recommended by the Committee might ultimately prove a paradise for lawyers.

It may not be out of place for me to urge attention on an aspect which has an intimate bearing on the role which joint-stock enterprise has to play or is expected to play in the scheme of the future economic development of the country. The law governing joint-stock companies essentially meant for the sphere in which private enterprise operates. It is, therefore, reasonable to expect that in attempting to reform that law, one should not bring about conditions which would impede the functioning or growth of private enterprise. Private enterprise again depends, to a large extent, for its success, on the individual initiative of a person or a group of persons who take to a particular project or proposition with some degree of personal zeal. If the law creates conditions which take away the incentive for sustained activity by the individual or the group of individuals who constitute the private enterprise, there is the risk of the legal checks proving to be a bar sinister in the way of the organisation of joint-stock enterprise becoming an effective instrument in the overall plan of economic development. As pointed out by Mr. Marker of the London Board of Trade, the problems in relation

to Managing Agents that have arisen in India are not, in principle, different from some of the problems that have arisen in the U.K., and it is possible that they could be met by legislation directed towards raising the standards of the less reputable, rather than by prohibitions which might not be effective, but might stifle private enterprise and impede the future development of Indian commerce and industry. It is my earnest desire that this larger aspect of the proposals being so adjusted as to continue to offer and provide the necessary measure of scope and incentive to private enterprise and more particularly the Managing Agency system which now provides industry with technical skill, Managerial ability, and the economies and other advantages of group management should be given equal importance. Judged from that stand-point, I feel that the recommendations on which I am constrained to dissent from my colleagues are not in the long-term economic interests of the country as a whole. With these general observations, I will proceed to record my dissent with reference to the specific recommendations —

1 *"Associate of Managing Agent"*—The proposal in paragraph 28 regarding "Associate of Managing Agent" is designed to impose certain disabilities on the person or persons who are deemed as Associates of Managing Agents. The definition proposed for the term "Associate of Managing Agent", however, is so wide that even persons who are only remotely connected with the Managing Agent or in regard to whose conduct or affairs the Managing Agent may have no effective control or say, are brought within the scope of the definition. While I do not object to some healthy checks on persons who, by reason of inter-connection of interests with the Managing Agents are in the nature of associates, care should be taken to see that persons who have really no interest in the Managing Agency arrangement or the benefits resulting therefrom are not roped in for the purpose of the disability. Thus, the definition "Associate of Managing Agent" includes a private company, one of whose shareholders is an employee or partner of the Managing Agent in question, as also any company in which a quarter of the voting power is exercised by a partner or director of the Managing Agent even though the voting power held by the Managing Agent himself may be negligible. The Managing Agent obviously has no control over the private company in question, nor on the conduct or action of the employee or the partner in relation to his activities connected with that private company. It is, therefore, unreasonable to impose any disability on such a company by artificially treating it as an associate of the Managing Agent, for, in the result it would be attaching a liability of an extremely vicarious character.

2 *Election as Directors of persons connected with Managing Agents*—The proposed amendment that certain persons connected with the Managing Agent should not be eligible for election as Directors except by 80 per cent majority vote is open to serious objection, firstly, as it is an encroachment on the right of the shareholders who form a majority to elect persons of their choice as Directors, and secondly, as it creates a new type of Resolution besides the Ordinary and Special Resolutions, for the purpose of the decisions of the shareholders. In the name of protecting minority interests, the rights of persons holding majority interests in a company should not be rendered nugatory. The proposal in its present form would mean that even where the Managing Agent holds a majority of

shares, the minority would be electing two-thirds of the Board, thus reducing the majority shareholders to a position of minority so far as the representation on the Board is concerned. In effect, it amounts to an expropriation of the property rights of the shareholders in relation to the effectiveness of that right for the purpose of the actual management of the affairs of the company. The proposal is being justified on the ground that the interests of the minority shareholders should not be prejudicially affected by the presence on the Board of a larger number of Directors likely to be influenced by the Managing Agent. Apart from occasions of such conflicts of interests being remote, the case for a special safeguard of this character by the deprivation of the inherent right of the majority shareholders to appoint Directors of their choice is not on strong grounds as, under the new proposals, power is given to a small proportion of the shareholders to seek relief or redress in Courts of Law where they have occasion to feel that the management of a company was oppressive to themselves or prejudicial to the company as a whole. I am, therefore, strongly of the view that in keeping with the accepted practice and procedure, the election of Directors should continue to be by a simple majority vote.

3 Maximum number of Directorships—The proposal that no person may be a Director in more than 20 companies at a time is again a restriction not only on the individual who, as a shareholder in a number of companies, is prevented from exercising his privileges or rights in relation to such share-holding, but is also a handicap on the companies concerned, limiting their sphere of choice. A person would be considered suitable for the office of Director by the shareholders of different companies on the main ground of his personal merits from the point of view of resources, capacity, experience and his energy for undertaking the obligation involved in discharging that onerous responsibility. Persons of that eminence and calibre required to command the confidence of the shareholders of a large number of companies would be limited in number and it would be taking an extremely short-sighted view to put a legal restriction in the way of the availability of the services of such persons for a larger number of undertakings if, from the special circumstances of the case, the shareholders of the undertakings consider it desirable in their own interest. Joint-stock organisation in this country has yet to make definite strides and the Committee have themselves been obliged to take note of the paucity of men of the requisite calibre and experience. I do not see, therefore, any reason for the law going out of its normal way to impose a limitation of the above character.

4 Prohibition of persons over age 65 from being Directors—The Committee have recommended that no person who has attained the age of 65 may be a Director of any company. This provision goes farther than the English Law under which a Director who had attained 70 years of age would continue to be eligible for such office if approved by the company after special notice. In view of the paucity of men of the requisite calibre and experience in this country I am strongly of the view that a provision permitting the election of such persons at least by special resolution should be included. I would point out that when the shareholders elect by Special Resolution, the person so elected might certainly be expected to be extremely valuable. The Committee have, no doubt, suggested that younger persons might be trained for Directorships, but I would point

but that for some years, at any rate, the services of the older persons should be available to companies, particularly in these times of stress when they alone might be depended upon to lay their finger on snags and with their rich experience and sound guidance, help the companies to steer clear of the difficulties and dangers that might be ahead

5 *Restriction on power of Directors to lease the undertaking*—I am opposed to the restriction on the power of the Directors to lease undertakings, on grounds of a practical nature. Leasing of the undertaking may often times prove to be advantageous and again may, in the normal course, be carrying on the activities of the company. The primary object of a particular company may be that of constructing buildings and giving the same on lease. Again, there may be shipping and air-plane companies whose business is to charter ships and planes. In the case of Land Companies, leasing of forests would be a normal day to day activity. For companies which operate seasonally, as in the case of oil mills, ginning factories, rice mills, and jute and cotton presses, business on a lease basis would, on many occasions, prove advantageous. In the case of companies having theatrical undertakings, leasing is a very common feature. It would, therefore, be placing an avoidable handicap on the conduct of business of such companies by making a provision to the effect that the Directors would be empowered to grant such leases only with the consent of the shareholders.

6 *Restriction on loans to Public Companies*—The restriction proposed in paragraph 103 precludes a company from granting a loan to other companies "accustomed to act in accordance with the directions or instructions of a Director of the lending company". The term "accustomed to act in accordance with the directions or instructions" is vague and its import is not clear. In actual application, it would lead to a good deal of confusion resulting in disputes and litigation. One can understand restrictions designed to check loans to companies in which a director or directors of the lending company may have a controlling interest. But the restriction should be specifically confined to such cases by making it clear and precise. Towards that end, I suggest that the proposed provision should be modified so as to prevent only loans to companies in which a Director or Directors of the lending company have a controlling interest, except with the consent of the shareholders.

7 *Duration of appointment of Managing Agents*—The proposal that the term of office of a Managing Agent should be limited to 15 years initially and to 10 years for purposes of renewal has not given adequate weight to the practical necessities of the situation. In the case of companies, particularly of a pioneering character, formed for the purpose of setting up heavy industries, there is a long period of initial waiting before the same goes into actual production. Importation of machinery, erection of the factory and installation of the plant, all take a long period of time. Again, there is a period which has to be spent in the process of organisation and stabilisation of the activities of the undertaking. In the present context, it is not unusual for foreign manufacturers of machinery to quote delivery period of three or four years for the purpose of supplying plant and machinery, when particularly the same is of a specialised nature. The difficulties are accentuated by the scarcity

or non-availability of building materials, raw materials on a regular basis and also technical skill. Even Government, with all its resources, has taken up a long period of years in putting up factories like the Sindri Fertilizer, and in the case of private owners, the period of initial preparation and waiting is bound to be longer. After all, in the case of private owners, even the preparatory work can actually be taken in hand only after the company as such is registered and floated. For the above reasons of a practical nature, I strongly feel that the existing position that duration of a Managing Agency arrangement shall be initially for a period of 20 years should continue. I am, however, agreeable to the period for the purpose of renewal being fixed at 15 years.

8 *Transfer of office of Managing Agents*—The recommendation that a transfer of Managing Agency should be approved by special resolution, instead of ordinary resolution as under the present law, again imposes another avoidable limitation. The effect of this amendment would be that 26 per cent of the shareholders could obstruct any change in the management, even if the majority wished for it. In view of the right now recommended by the Committee to the shareholders to apply to the Court for relief under the proposed Sections 153-C and 153-D to seek redress by applying to the High Court is an effective safeguard against changes taking place prejudicial to the interests of the shareholders. I am, therefore, unable to appreciate the need for any further restriction on transfer of Managing Agency as contained in the recommendation under reference.

9 *Definition of Nett Profit—Losses of previous years*—I am unable to agree to the proposal that losses in previous years should be deducted in calculating nett profits for the purpose of arriving at the remuneration payable to Managing Agents. In the initial years, losses represent the effort in building up the enterprise. In later years, losses may be the result of some abnormal circumstances beyond the control of the Managing Agent. Hence the proposal to deduct from the profits arising from the working of a company in a particular year, the losses incurred in previous years would be tantamount to penalising the Managing Agent for the efforts made by him in building up the enterprise or for things over which he had no control. Moreover, after all these deductions are made, the balance left over would be so little as to cut at the incentive of Managing Agents. When the working of the company has resulted in profit in any particular year, it is reasonable that the Managing Agent should be adequately remunerated for his work and contribution during that period in bringing about that profit position. It must be remembered that a great many companies in the country are small ones and the principles derived from the working of big companies cannot equitably be applied to them. For the above reasons, I am unable to agree to the introduction of the factor of carry-forward of losses for the purpose of determining the Managing Agency remuneration. Again, for the purpose of calculating the remuneration payable to Managing Agents, whatever receipts, revenue or capital, are added to the income for the purpose of arriving at income-tax liability, should be included in the gross profits.

and whatever is allowed as expenses should be deducted from the gross profit. That would produce a fair basis for arriving at the remuneration due to Managing Agents.

10 *Partners or Members of Managing Agency in office of profit*—Under the Factories Act, the occupier of a factory has to nominate a person as responsible for carrying out the provisions of that Act and under Section 100(2) of that Act, where the occupier is a body corporate, only a Director or Shareholder thereof, or in the case of a Firm a partner thereof, could be so nominated. Under Section 2(n) of that Act, in the case of a factory managed by a Managing Agent, the occupier is the Managing Agent. Accordingly, it has been the practice with all Managing Agency companies to nominate one of their key members for this purpose and, in view of the onerous duties involved therein, have a special remuneration paid to him by the company. The amendment proposed in paragraph 126 prohibiting partners of the Managing Agency firm and members of the Managing Agency company from holding an office of profit in the company would render payment of such special remuneration impossible. In the case of a company managed by Directors, however, it is open to the management to make a separate salaried appointment for the purpose of Section 100(2) of the Factories Act. I would suggest that the Factories Act be amended so as to permit also Managing Agents to nominate for the purpose of Section 100 of the Factories Act, a paid executive who may not be a member of the Managing Agency.

11 *Managing Agents and competitive business*—Section 87-H as proposed to be amended provides that if a Managing Agent holds 20 per cent or more of the voting power in a private company, carrying on business similar to that carried on by the managed company, he will be deemed to be carrying on competitive business on his own account and become liable to the disabilities attached thereto. The 20 per cent limit is unduly small, for the Managing Agent on that basis has no controlling interest in such private company and may not be in a position even if he wishes, to order or alter the business activities of that company. The amendment would also be a deterrent to industrial development, since instances are not wanting where a Managing Agent promoted more than one enterprise of the same nature and subscribed for shares in the absence of adequate response from the public. I, therefore, feel that the limit should be increased to 51 per cent.

12 *Inspection etc., at the instance of members*—In providing redress or relief to shareholders by vesting in them the right to apply for ordering an inspection into the affairs of the company, or for reliefs on the ground of the management being oppressive to the minority or prejudicial to the interests of the company as a whole, I feel that care should be taken to see that the said right is not capable of being used vexatiously or at the instigation of trade rivals or managements previously defeated. Towards that end, I suggest that it should be modified that at least members holding

5 per cent of the paid-up share capital, or 200 members should alone be entitled to make applications for inspection or for relief on the ground of oppression of the minority or of the management being prejudicial to the company. I am not against the shareholders being provided with safeguards to protect their own rights. I am only anxious to prevent the right being mis-used in a frivolous manner, since any such application, with its attendant fuss, would damage the reputation of the company, dislocate its normal work and also cause a fall in the value of its shares, thus affecting innocent investors and providing a handle for undesirable elements.

13 Retrospective and Expropriatory Amendments—The Committee have suggested that some of their recommendations, when given effect to by appropriate legislative changes, should have retrospective effect. Some of the recommendations, moreover, expropriate rights already conferred or secured under the existing provisions of the law. I am strongly opposed in principle to legislation having retrospective effect. I also feel that if the rights, legally accruing under the provisions of the law as it stood before the change are to be disturbed, there is the danger of that element of insecurity having a demoralising effect on investors in joint-stock undertakings as also on the country's credit abroad. The Committee have suggested that the power to grant exemption in regard to shares with disproportionate voting or other rights should not be available in respect of shares issued after 1st December 1949. This discrimination is not justified. Again, the proposal that all existing Managing Agency arrangements should terminate on 15th August 1959 is expropriatory in character. I suggest that an exception should be made in favour of Managing Agents of companies promoted between 1939 and 1950. It is reasonable to suggest that they should be allowed the benefit of the continuance of the existing arrangement for the remaining period of their agreement. The benefit of the provisions in the 1936 Act should be fully extended to them. Similarly the recommendation that the Committee's proposals relating to the remuneration of Managing Agents should apply to all Managing Agents within two years of the commencement of the new Act, is expropriatory in character. I would suggest that remuneration on the terms provided in their respective agreements might be permitted at least till 15th August 1959, except in the case of Managing Agents of companies promoted between 1939 and 1950 who might be permitted to draw remuneration at the rates provided in their agreements for the rest of the period under their respective agreements. Finally the proposal that the changes recommended in regard to inter-locking should take effect from the date of publication of the Report is extremely unusual and unfair. Not only would this amount to a retrospective measure but also there is no sanctity attached to the date of the publication of the Report, for, there is no automatic change in the position of the law immediately on publication of the Report. The changes should be effective only after a period of time after the passing of the new Act so as to provide adequate opportunity and time to the companies concerned to readjust their position in consonance with the altered requirements of the law.

14 *No penalty of imprisonment*—The Company Law deals with offences of a civil character and is not primarily meant to deal with criminals. I am strongly opposed to the changes recommended in Sections 86-D, 87-D, 87-E and 87-F providing for punishment by imprisonment under certain circumstances. The penalty of imprisonment should be confined to cases involving acts of moral turpitude.

Bombay, 11th January, 1952

MOHANLAL L SHAH

ANNEXURE

TO THE

REPORT

DETAILED RECOMMENDATIONS OF THE COMMITTEE

[To be read with the Addendum]

NOTE

The Annexure is cast in the form of a tabular statement and contains three columns. The first column refers to the sections of the Indian Companies Act which, in the Committee's view, require amendments, the second column contains the substance of these amendments, while the third column contains brief comments explaining the nature of the changes introduced and also cross references to the paragraphs of its Report and to the corresponding provisions of the English Companies Act, 1948, where such comments or references are considered necessary. Where the Committee has recommended the insertion of new provisions whether based on the English Companies Act, 1948, or not, the nature of these provisions has been indicated at appropriate places. All such proposed new sections have been italicised. Where no changes in the existing provisions of the Indian Act have been suggested no mention has been made of them in the Annexure.

In the Addendum attached to the Annexure, the Committee has attempted redrafts of several sections of the Indian Companies Act and also drafts of some new sections, based on analogous provisions of the English Companies Act, which it has considered it necessary to include in the Indian Act. The Addendum should be treated as part of the Annexure. References to it have been made in the Report where necessary.

ANNEXURE

TO THE

REPORT OF THE COMPANY LAW COMMITTEE 1952

DETAILED RECOMMENDATIONS OF THE COMMITTEE,

PART I

Preliminary

Section No. and Heading	Changes suggested by the Committee	Remarks
1	2	3

¹
Short title, commencement and extent. (a) To be suitably revised when the draft Bill based on the Committee's recommendations is prepared
(b) *Sub section (3)*—The Act should extend to the whole of India

²
Definitions (1) . . . (1) "*articles*"—A reference to the tables and schedules as may be annexed to the new Act, and also a reference to the 1913 Act should be made

New Clause

(1A) "*associate of a managing agent*" shall mean and include the following and none other —

- (a) any firm of which the managing agent is partner,
- (b) any partner of the managing agent,
- (c) any private company of which the managing agent or any partner of the managing agent or any officer of the managing agent where the managing agent is a company, is a member, director, managing agent or manager,
- (d) in the case of a managing agent which is a body corporate, any subsidiary company of the managing agent and any director, managing agent or manager of the managing agent or of any subsidiary company of the managing agent,
- (e) where the managing agent is a private company, any member or director thereof, and
- (f) any company at any general meeting of which the managing agent, either alone or together with any partner of the managing agent and (where the managing agent is a company) any director of the managing agent, is entitled to exercise or control the exercise of one quarter or more of the voting power

(Paragraph 28 of the Report)

Experience has shown that if the provisions of the Act relating to managing agents are to be effectively enforced, it is necessary to extend these provisions to associates of managing agents as defined in this clause. Otherwise, such associates would provide an agency through which the provisions of the Act relating to managing agents would be easily evaded.

New Clause

(1B) "*banking company*" — A definition of a "banking company" on the lines of the definition contained in the Banking Companies Act should be inserted.

(1C) A "branch office" in the case of a banking company or an insurance company means an establishment described as a branch by the banking company or the insurance company. In the case of companies other than banking and insurance companies, a "branch" means an establishment where the same or substantially the same activity as that carried on at the head office is carried on and does not include the producing or manufacturing centres or places where such centres or places are situated at a place other than the registered office of the company

(Paragraph 28 of the Report)

(1D) "Central Authority" means the Commission appointed under Part VI of the Act, by whatsoever name it may be called, for exercising the powers conferred on it by this Act or carrying on such other functions as may be entrusted to it by the Central Government under this and other Acts or otherwise, relating to the promotion, formation, working and management of companies

(Paragraph 28 of the Report)

The Committee considers that it is essential to build up a competent and adequate central organisation for the discharge of the general powers of supervision and control over the working of joint stock companies and generally for the better administration of the Indian Companies Act. It will not be possible for the Central Government to discharge effectively any of these functions departmentally. In the scheme of organisation, which the Committee visualises, the Central Authority will occupy a pivotal position and constitute the main arch on which the entire administrative structure will hang. The details of the organisation of the

Central Authority have been dealt with in the Report

(2) "*Company*"—The present definition may stand but in the Report a reference has been made where the Committee has drawn attention to the definition of "*Company*" in New York and Swiss Companies Act. It will be for Government to consider whether the requirements on the lines of the New York and Swiss Acts that one or more directors of a company should be of Indian nationality should be included in the definition of "*company*" in the Indian Act.

(4) "*debenture*"—This definition should be changed as follows —

"*debenture*" includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not"

(7) "*existing company*"—A reference to the Indian Companies Act, 1913, should be made

(7A) "*financial year*" means, in relation to any body corporate, the period in respect of which any profit and loss account of the body corporate laid before it in general meeting is made up, whether that period is a year or not

(Paragraphs 29 and 83 of the Report)

(Paragraph 27 of the Report)

The change follows the English definition, [of section 455 (1) of the English Act, 1948]

(Paragraph 28 of the Report)
This definition will possibly require amendment to cover cases of companies which have half-yearly or quarterly accounts if the Committee's other recommendations on the accounts provisions are accepted.

Provided however, that in no case shall the period be more than 15 months, or more than 18 months in cases where special permission has been granted by the Registrar

(9) "*manager*" means a person who, subject to the control and direction of the directors, has the management of the whole or substantially the whole of the affairs of a company and includes a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not but does not include a managing agent

(Paragraph 27 of the Report)

(9A) "*managing agent*" means a person, firm or company entitled to the management of the whole or substantially the whole of the affairs of a company by virtue of an agreement with the company or by virtue of the memorandum or articles of association relating thereto and includes any person, firm or company occupying such position by whatever name called.

(Paragraph 27 of the Report)

(9B) "*managing director*" means a director who, by virtue of an agreement with the company is entrusted with powers of management which would not be exercisable by him but, for such agreement, and includes a director occupying the position of a managing director by whatever name called

(Paragraph 28 of the Report).
'This definition fills a lacuna in the present Act

Courts but feels that in respect of certain matters which involve the exercise of discretion in important issues of policy (*e g* in matters arising out of winding-up proceedings or out of the proposed new sections 153C and 153 D) or raise complicated points of law, cases should be triable only in High Courts

PART II

Constitution and Incorporation

3

2

1

<p>4</p> <p>Prohibition of partnerships exceeding certain number.</p>	<p>A few verbal changes may be necessary to fit in this section with India's new constitutional status</p>	<p>The reference to Indian law, Royal Charter, etc., may have to be suitably altered</p>
<p>6 to 8</p> <p>Memoranda of company limited by shares, and guaranteee and unlimited company.</p>	<p>The arrangement of these sections may be suitably revised to avoid duplication of similar phraseology in the different sections</p>	<p>The question of relegating the requirements of sections 6 to 8 to schedules should be considered</p>
<p>11</p> <p>Name of company and change of name</p>	<p>Sections 17 and 18 of the English Act should be adopted with suitable changes</p>	<p>(Paragraph 36 of the Report). The principal change needed is the re- placement of the words "Board of Trade" by the "Central Authority".</p>
<p>17</p> <p>Registration of articles</p>	<p>Sub section (2) should be amended so as to bring it in conformity with the Committee's proposal on Table A</p>	<p>(Paragraph 34 of the Report)</p>

Articles of Association

1

2

3

(d) Subject to the above modifications, the provisions of section 19 of the English Act should be adopted in preference to the provisions of this section, (Paragraph 38 of the Report)

27

Companies limited by guarantee

Provision as to companies limited by guarantee For the words "after the commencement of this Act" in sub-section (1) read "after the 1st day of April 1914". Self-explanatory.

PART III

Share Capital, Registration of unlimited company as limited, and unlimited liability of Directors Distribution of Share Capital

1

2

3

New section

Membership of holding company

Insert section 27 of the English Act.

(Paragraph 40 of the Report)
This section applies only to the membership of holding companies for which the special provisions contained in this section are necessary

31

Register of members . . .

The proviso to sub-section (1) of section 110 of the English Act should be inserted after sub section (1) of the Indian Act.

32

Annual list of members and summary.

(a) The particulars now included in the existing Form 'E' in the Third Schedule to the Indian Companies Act should be brought in line with the Sixth Schedule in the English Act

(Paragraph 41 of the Report)
The information asked for in the Sixth Schedule is ampler than in Form 'E'

(b) In addition to the list of members, the annual return should also contain a list of debenture holders where there are registered debentures

(c) The lists of members, debenture holders and directors should also indicate their occupation

(d) A separate heading for bonus shares should be inserted under sub section (2)

This is suggested in order that these shares might fall under sub section (1) (a) of section 104 of the Indian Companies Act and might not be construed to fall as they are at present construed under sub section (1) (b) of section 104

(e) Sub-section (3) should be replaced by the provisions of sections 126(1) and (2) of the English Act, subject to the proviso that the time limit within which the annual return is to be submitted should be one month and not forty-two days as in the English Act

Section 126(1) of the English Act extends the period during which the annual return has to be completed from 21 to 42 days after the general meeting of the company

(f) The provisions of section 125 of the English Act should be incorporated in a separate sub section

Section 125 of the English Act provides for the submission of the annual return by a company *not* having a share capital

(a) The existing provisions should be retained with a right of appeal to the Central Authority against any refusal by the directors of a public company to register transfers, provided that the enquiry before the Central Authority should be held confidentially

34
Transfer of shares

(Paragraphs 42 and 43 of the Report)

(b) Transfer forms should contain the addresses of transferees

(c) It is considered desirable to include the provisions of section 79 of the English Act, relating to certification of transfers in this section—preferably in an independent section to follow section 34

(Paragraph 45 of the Report)
The provisions of this section are wider than those of sections 75 to 78 of the English Act This section raises the main issue whether directors should have the power to refuse to register transfers The Committee has discussed this point in the Report

For purposes of this section the word 'scrip' in sub-section (3) may be defined to include a letter of allotment Section 79 of the English Act which the Committee recommends for adoption in the Indian Companies Act follows the recommendations of the Cohen Committee in paragraph 139 (*vide* paragraph 44 of the Report)

New section
Evidence of grant of probate.

The provisions of section 82 of the English Act should be incorporated, after deletion of the words "or confirmation as Executor,"

This section compels a company to accept the probate of a will or letters of administration as sufficient evidence of passing of title to shares

1

2

3

36

Inspection of registrar of mem
bers.

In sub section (2) the words "and days on which the transfer books of the company are closed" should be deleted

It is desirable that the list of shareholders should be available within a reasonable period, otherwise, the shareholders' interests might suffer if concerted action is to be taken in respect of any resolution for which notice is given by the company. Compare section 113(2) of the English Act

37

Power to close register

Penalty for disregard of the provisions of this section by giving shorter notice and also closure for longer period should be provided Such penalty should, however, be imposed for a breach of the section knowingly and wilfully

41

Power for company to keep
branch register in the
United Kingdom

Self explanatory

These sections should be made applicable to all foreign countries. Consequently, the word 'British' should be replaced by the word 'foreign', and consequential changes made

42

Regulations as to British
register

43 to 48

Sections on share-warrants

These sections should be retained subject to the stipulation that—

(Paragraph 46 of the Report)

Having regard to the nature of share-

warrants, the Committee considers that it is desirable to provide the safeguards suggested in column 2

(1) the issue of share warrant should be allowed only in those cases where there is provision for such issues in the articles of the company, and

(2) the prior approval of the Central Authority has been specifically obtained to such issues

(Paragraphs 47 to 49 of the Report)

These important provisions will have to be suitably incorporated under appropriate sections. For this purpose it may be necessary to have one or more sections dealing with the types of shares which a company may issue and the rights attaching to such shares

This provision will also empower preference shareholders to express their views in any scheme of reduction of the share capital of a company under section 55 of the Indian Companies Act

Power of company to arrange for different amounts being paid on shares

49

This section should be amended on the following lines —

(1) The capital of a company should as regards issues made after the date of the publication of the Report, be divided into two broad categories, namely, equity capital, as defined in the redraft of section 105C which is item 21 of the Addendum and preference capital. All share capital of a company other than equity capital should be deemed to be preference capital

(2) Preference shares should, in future, have only qualified voting rights, i.e., in the following contingencies —

(a) during such period as the preference share dividend or any part thereof remains in arrears and unpaid such period starting from a day not more than a year or such lesser period as the articles might provide, after the due date of the dividend, and

(b) in regard to any resolution passed, which directly affects any of the rights attached to such shares or the interests of the holders thereof including any resolution for the winding-up or reduction of capital of the company

In the case of non-cumulative preference shares the voting rights of holders of such shares should be exactly on the lines of those given to cumulative preference shareholders, subject, however, to the exception that non-cumulative preference shareholders shall not be entitled to vote unless their dividends have remained unpaid for a successive period of two years. Such voting rights shall be exercisable only when payment has not been made for two successive years.

(iii) Voting rights in the case of all shares—equity as well as preference, when such rights become operative in the case of preference shares—should be strictly in proportion to the capital paid or credited as paid up thereon.

(iv) No class of shares other than a preference share carrying a fixed dividend should be issued, which confers any rights as to dividend, capital or voting power of the company, disproportionate to the rights attaching to the ordinary shares without the prior consent of the Central Authority.

(v) As regards existing companies which have issued any shares, by whatever name called, conferring on the holders thereof voting rights more favourable than those which we propose should be conferred in future on the holders of equity

capital, it should be provided in the Act, that the companies must, within a period of three years from the passing of the Act, bring the voting rights in respect of such shares in proportion to the amount of capital paid up or credited as paid up thereon

Provided, however, that during this interim period such disproportionate voting rights should not be exercised on any resolution relating to the appointment or reappointment of a managing agent or any variation in the managing agency agreement, the appointment of buying or selling agents, the grant of loans to any company under the same management as that of the managing agent of the company or the managing agent's associates. On resolutions relating to these matters the voting rights should be strictly in proportion to the capital paid up on such shares

(v) The Central Authority should, however, have the power to exempt any company from the requirement of the last preceding clause if it thinks that there are special reasons for doing so but the exemption suggested above should not be granted to any company which has issued shares with disproportionate voting, dividend or other rights after the 1st December 1949, when the Government of India's Memorandum on the Amendment of the Indian Companies Act was made known to the public

- (vii) The voting, dividend or other rights attaching to any existing shares should not be affected by the Act
- (viii) Where calls are made, they must be made on a uniform basis for the amounts so called on each share in any particular class

Reduction of Share Capital

54A

Restrictions on purchase by company or loans by company for purchase of its own shares

(Paragraph 50 of the Report)

- (a) The provisions of this section other than sub-section (1) should not apply to private companies not being subsidiaries of public companies
- (b) Add the following at the end of sub section (2) of this section
- “or where the company is a subsidiary company, in its holding company”
- (c) Add the words “or subscription” after the word “purchase” in line 5 of this sub-section
- (d) The proviso to sub section (2) should be modified as follows
- “Provided that nothing in this sub-section shall apply to the lending of money by a bank in the ordinary course of its business”
- (e) A separate sub-section should be inserted under this section incorporating the provisions of clauses (b) and (c) of the proviso to sub section (1) of section 54 of the English Act subject to the condition that the power exercisable under the latter

clause of the proviso should in this case be exercisable under the provisions laid down under the Act, and the payment should be subject to the limit of 3 months' salary

59

Power to dispense with consent of creditor on security being given for his debt

The provisions of section 67(3) of the English Act should be inserted under this section (Paragraph 51 of the Report)

Variation of Shareholder's Rights

66A

Rights of holders of special classes of shares

The time limit given in sub-section (2) should be extended to 21 days It has been suggested in this connection that *regulation 4 of Table 'A'* should be made compulsory Compare section 72 of the English Act

PART IV
Management and Administration

I

2

3

Office and Name

72

Registered office of company

A sub section should be added under this section to empower directors to remove the registered office of a company from any place to another within a radius of 10 miles but it should be provided that if the office is to be removed outside this limit, a special resolution of the share holders will be necessary

The object of this section is to prevent unscrupulous managements from transferring the registered office of a company to a remote and not easily accessible place where shareholders may find it difficult to meet

76

Annual general meeting

Meetings and proceedings

This section should be amended as in the re-draft given in the Addendum (Item 1)

(Paragraph 73 of the Report)
Cf section 131 of the English Act, but it has been stipulated in sub section (1) that the annual general meeting must be held within 18 months of the incorporation of a Company and thereafter within 9 months from the end of its financial year, provided that not more than 15 months shall elapse between the date of one general meeting and that of the next

The other principal changes made in the 1c draft are that—

(a) the general meeting should be held in the registered office of the company or in the same town, during office hours and on a working day,

(b) the Registrar has been given the discretion to extend the period of time during which an annual general meeting should be held by a further period of six months, and

(c) in default of the holding of an annual general meeting by the company, the power to call an annual general meeting should vest in the Central Authority

Statutory meeting of company.

(a) Sub-section (3) (f) should be amended as follows
 "The extent to which an underwriting contract, if any, has not been carried out and the reasons thereof"

(b) Sub sections (3) (g) and (h) should be brought in line with each other, *i.e.*, the provisions of sub-section (3) (g) should be extended to persons mentioned in sub section (3) (h)

(c) In sub section (4) the words "after being signed by the directors" should be added after the words "be certified as correct by the auditors of the company,"

(Paragraph 72 of the Report)

Disclosure of the extent to which the underwriting contract has not been performed would better serve the object in view

Self explanatory

Self explanatory

78

Calling of extraordinary general meeting on requisition

The provisions of sub section (2) should be so amended as not to require the requisition to be signed by all *joint* shareholders mentioned in sub section (1)

(Paragraph 76 of the Report)

New Section

Circulation of members' resolutions

A new section on the lines of section 140 of the English Companies Act should be inserted

(Paragraph 76 of the Report)

79

Provisions as to meetings and votes

This section should be split up into two sections—sections 79 and 79A as in the re-drafts given in the Addendum (Items 2 and 3) ,

(Paragraph 75 of the Report)

The principal changes proposed in the re-drafts are as follows —

(i) All meetings of a company shall require 21 days' notice, and a shorter notice will be permitted in the case of an annual general meeting only when all the members entitled to attend and vote agree to it, and in the case of other general meetings only when 95% of such members agree

(ii) Particulars of the business to be transacted at a general meeting, together with the interest, if any, of the directors in such business should be mentioned in the notice of a general meeting

(iii) Where a poll is demanded at a general meeting, the chairman of the meeting is empowered to appoint scrutineers to scrutinise the votes

(iv) Registered shareholders are only debared from exercising voting rights, if they have not paid calls due on shares or the company has exercised its lien on such shares

(v) The new section 79A contains several new provisions about proxies similar to those in section 136 of the English Act, and also provides that (a) every instrument of proxy shall be in writing, and in the case of a body corporate under its seal or under the hand of its officer or attorney, and (b) a member shall have the right to inspect the proxies lodged under certain conditions, if three days' notice of intention to inspect is given to the company

New Section
ting on a poll

. . . A new section on the lines of section 138 of the English Companies Act should be inserted

{Paragraph 77 of the Report}

New Section

Resolutions requiring special notice and resolutions passed at adjourned meetings

(Paragraph 78 of the Report).

80

Representation of companies at meetings of other companies of which they are members

This section should be replaced by section 139 of the English Act and sub-section (2) of the English section should be amplified to make it clear that the person authorised under this section can act as the representative of the corporation in all the matters specified in the resolution authorising him to exercise the powers on behalf of the corporation which he represents

The amendment makes the provision of section 80 applicable to all bodies corporate irrespective of whether they are companies within the meaning of the Indian Companies Act or not and also enlarges its scope by extending it to creditors of companies or corporations

81

Extraordinary and special resolutions

This section should be replaced by section 141 of the English Act subject to the following changes and to the deletion of the words "or the Articles" from sub-section (5) thereof

(i) Only two kinds of resolutions shall be passed at a general meeting of the company, an ordinary resolution and a special resolution

(ii) In view of the replacement of extraordinary resolution by a special resolution, it is necessary that wherever the term "extraordinary resolution" is used in the article or contract, the term "special resolution" should be substituted

(Paragraph 78 of the Report).

(123) A resolution shall be an ordinary resolution when it has been passed by a bare majority of the members present and voting at a meeting of which not less than 21 days' notice shall have been given in a manner prescribed in the Act

(124) Nothing herein contained shall affect the right to vote on an ordinary resolution given to any person other than the shareholder by any contract entered into before the passing of the new Act

(125) A resolution shall be a special resolution when it has been passed by a majority of 75 per cent of the members present and voting at a meeting of which not less than 21 days' notice specifying the intention to propose a resolution as a special resolution has been duly given

Any provision to the contrary in any articles of association or managing agency agreement shall be void

83

Minutes of general meetings and of directors.

This section should be amended as in the redraft given in the Addendum (Item 4)

(Para graph 79 of the Report)
The principal changes in the redraft are as follows —

- (1) The proceedings of general meetings of a company or board of directors should contain a fair summary of what transpired in the meeting and in particular

New Section

Resolutions requiring special notice and resolutions passed at adjourned meetings A new section similar to the provisions of sections 142 and 144 of the English Act should be inserted (Paragraph 78 of the Report).

80

Representation of companies at meetings of other companies of which they are members This section should be replaced by section 139 of the English Act and sub section (2) of the English section should be amplified to make it clear that the person authorised under this section can act as the representative of the corporation in all the matters specified in the resolution authorising him to exercise the powers on behalf of the corporation which he represents The amendment makes the provision of section 80 applicable to all bodies corporate irrespective of whether they are companies within the meaning of the Indian Companies Act or not and also enlarges its scope by extending it to creditors of companies or corporations

81

Extraordinary and special resolutions This section should be replaced by section 141 of the English Act subject to the following changes and to the deletion of the words "or the Articles" from sub-section (5) thereof (Paragraph 78 of the Report).

(1) Only two kinds of resolutions shall be passed at a general meeting of the company, an ordinary resolution and a special resolution

(2) In view of the replacement of extraordinary resolution by a special resolution, it is necessary that wherever the term "extraordinary resolution" is used in the articles or contract, the term "special resolution" should be substituted

(iii) A resolution shall be an ordinary resolution when it has been passed by a bare majority of the members present and voting at a meeting of which not less than 21 days' notice shall have been given in a manner prescribed in the Act

(iv) Nothing herein contained shall affect the right to vote on an ordinary resolution given to any person other than the shareholder by any contract entered into before the passing of the new Act

(v) A resolution shall be a special resolution when it has been passed by a majority of 75 per cent of the members present and voting at a meeting of which not less than 21 days' notice specifying the intention to propose a resolution as a special resolution has been duly given

Any provision to the contrary in any articles of association or managing agency agreement shall be void

Minutes of proceedings of general meetings and of directors.

This section should be amended as in the redraft given in the Addendum (Item 4)

(Para graph 79 of the Report)
The principal changes in the redraft are as follows —

- (i) The proceedings of general meetings of a company or board of directors should contain a fair summary of what transpired in the meeting and in particular

of all material questions asked or comments made. In the case of minutes of directors' meetings the minutes shall also record the names of directors who have dissented from a resolution.

- (u) No report of the proceedings of the meeting of a company shall be circulated or advertised at the expense of the company unless the report contains all the particulars which are required to be included in the minutes.

2152

Directors

- . This section should be amended as in the redraft given in the Addendum (Item 5)

(Paragraph 82 of the Report).

The main change in the redraft is that no body corporate can be appointed directors of the company. The Committee examined the suggestion whether there should be a provision in this section empowering the Central Government to direct, that not more than half the number

of directors of a company should be citizens of India if in the opinion of the Central Government it was in the national interest to do so, but decided that it should be left to the Central Government to decide the issue. However, a reference to this point has been made in the Report.

Should be amended as in the redraft given in the Addendum (Item 6) (Paragraphs 84 and 85 of the Report)
The principal changes made in these amendments are as follows

- (1) Voting on the appointment of directors whether in a public or private company is to be done individually
- (2) Casual vacancies may be filled by directors but only until the next following ordinary general meeting
- (3) The categories of persons mentioned in sub clauses (a) to (g) of clause (3) of sub-section (2) of the redraft will require at least 80 per cent. of the votes of the members present in person or by proxy at a general meeting and voting before they can be elected to the board of

a company The object of this provision is to prevent the nominees of managing agents or persons who can be presumed to be under the influence of managing agents to be elected as directors in the two-thirds quota set apart for shareholders, directors unless they have the support of at least 80 per cent of the shareholders present at the general meeting

New Section

Retirement of directors under age limit and duty of directors to disclose age to company

A new section should be inserted to provide that— (Paragraph 90 of the Report)

- (1) the age limit for directors should be 65,
- (2) the provision of section 186 of the English Act regarding the disclosure of their age by directors to the company should be inserted as a sub-section of this section

This section should not apply to private companies other than subsidiaries of public companies

84

Restrictions on appointment or advertisement of director

This section should be suitably amended to provide that— (Paragraph 86 of the Report)

- (i) the requirements about the qualification shares should not apply to (a) technical directors, (b) trusteeship holdings and (c) persons nominated by companies which hold the requisite qualification shares and (d) directors nominated by Government

It would seem desirable not merely to amend the sections relating to the appointment, qualification and dis-qualification of directors but also re-arrange them suitably so that the various sections in the present Com-

Provided further that in cases of such nominations the fees received by the nominated directors should be paid back to the nominating companies,

- (ii) the consent of the directors to their appointment as such should be obtained also for new appointments as these are not covered under the present section 84 which covers only first appointments of directors made under the articles of the company or at the time of its floatation. A suitable clause should be inserted to provide for such consent under section 84,
- (iii) the directors should file a declaration as to their holdings of the necessary qualification shares

panies Act which relate to the appointment, qualification and disqualification of directors are brought together in a logical sequence. The relevant sections seem to be 83A, 83B, 84, 85, 86A and 86I

85

Qualification of director . . . Should be amended as in the redraft given in the Addendum (Item 7)

(Paragraph 86 of the Report)

The principal changes made in the amendments to this section are as follows.

- (i) The maximum amount for qualification shares is not to exceed Rs 5,000 in nominal value,
- (ii) a statutory time limit of 2 months is fixed during which the qualification shares if not already held are to be acquired,
- (iii) the articles of a company are precluded from varying this statutory requirement,

(w) it is provided that all directors other than technical directors should hold the qualification shares beneficially. An exception is, however, made in the case of shares held by a trustee for some third person not being a managing agent of the company or an associate of a managing agent and for shares held by a nominee holder on behalf of some other company not being a managing agent of the company or an associate of the managing agent where the remuneration received by the nominee holder as director is paid by him to such other companies and for persons nominated as directors by Government

226

New Section

Restriction on the number of directorships to be held by a person. A new section should be inserted as in the redraft given in the Addendum (Item 8)

(Paragraph 91 of the Report)

The object of this new section is to limit the number of directorships that can be held by a person

Validity of acts of directors. The proviso to this section should be amended as follows

"Provided that nothing in this section shall be deemed to give validity to acts done by a director after the appointment of such director has been *shown to the company* to be invalid"

The absence of the words italicised in column 2 has led to ambiguity which it is desirable to clear up

36A

Ineligibility of bankrupt to act as director To be replaced by section 187 of the English Act with suitable adjustments

This section should be brought under the group of sections dealing with disqualifications of directors which should come immediately under sections dealing with qualifications of directors

36B

Assignment of office by directors This section should be amend as in the redraft given in the Addendum (Item 9)

(Paragraph 95 of the Report)
The principal changes made in this redraft are as follows

(a) a total prohibition is imposed on the assignment by directors or managers irrespective of whether such an assignment is approved by a special resolution of a company or not,

(b) the power now conferred on a director to appoint an alternate or substitute is to vest in the board of directors and not in the individual director,

(e) if during the period of absence of the original director he has to retire under the terms of his appointment from the board, the alternate or substitute appointed for him in the board will not be eligible for reappointment, but the original director will be so eligible

86C

voidance of provisions
relieving liability of directors

(a) The proviso (a) should be deleted
(b) The following proviso should be added to this section

"Provided that no such indemnity shall apply to the constituted attorney of the managing agent of the company unless such attorney is or is deemed to be an officer of the company"

The object of this proviso is to prevent constituted attorneys who are not officers of a company from taking advantage of the indemnity provided by clause (c) of the present section 86C

253

New Section

General powers of a board of directors vis-a-vis managing agents and committees of directors

A new section should be inserted as in the redraft given in the Addendum (Item 10)

(Paragraph 101 of the Report)

The object of this new section is to indicate the general powers of the board of directors and to set out the limits of delegation of authority be the board to managing agents and committees of directors. Clause (2) of the redraft enumerates the matters in respect of which the directors

cannot delegate powers to managing agents Similarly, clause (3) of the redraft indicates the limits of the powers of committees

This section should be amended as in the redraft' (Paragraph 106 of the Report)
given in the Addendum (Item 11)

The main changes made in these amendments are as follows

(1) The prohibition of loan is extended to any firm or private company of which the director of the lending company is a member or director and also to any public company, the managing agent, manager or directors of which are accustomed to act in accordance with the directions or instructions of the directors of the lending company

(2) The penalty provided for contravention of the provisions of this section is enhanced

(3) Provision is also made for the recovery of any monies paid in contravention of this section and a corresponding reduction in the penalty, where such recovery has been partially made proportionate to the amount recovered, has been provided

New Section

Savings in the case of certain debts

A new section should be inserted to provide that penal provisions regarding prohibited loans and advances should not apply to debts treated as loans and advances for the purposes of the balance sheet unless the transactions in question were from their very inception in the nature of loans and advances

In the Chapter of the Report dealing with accounts and audit it has been recommended that book debts which are not repaid within a specified period shall be treated as loans and advances for the purposes of the balance sheet, but it is not the intention of the Committee that the penal provisions which attach to the making or receipt of loans and advances by the directors or the managing agent should apply to book debts which are treated as loans and advances

260

36E

Director not to hold office of profit

(a) The first paragraph of this section should be amended as follows

"No director or firm of which such a director is a partner or a private company of which such director is a director shall without the previous consent of the company in general meeting by a special resolution hold any office or place of profit under the company except that of a managing director or manager or legal or technical adviser or a banker"

(Paragraph 107 of the Report)

The scope for abuse of the provisions of this section will be considerably reduced if the holding of office or place of profit by a director in a subsidiary company except with the consent of the holding company in general meeting by a special resolution was prohibited

- (b) The prohibition contained in the above clause should also apply to the holding of office or place of profit by a director of a holding company in a company which is a subsidiary unless the director in question returns the remuneration received by him from the subsidiary company for holding office or place of profit to the holding company
- (c) The explanation to this section should be amended as follows

“For the purposes of this section, the office of managing agent shall not be deemed to be an office of profit under the company and a trustee for debenture holder shall not be deemed to hold a place of profit under the company”

Extension of this provision in the manner proposed is necessary to prevent an unscrupulous director of a holding company from taking advantage of the law

36F

Sanction of directors necessary
for certain contracts

- (a) This section should be amended to provide— (Paragraph 108 of the Report)
- (i) that the previous consent of the directors would be necessary for any such contract as is mentioned in this section,
- (ii) that in the absence of previous consent the contract must be ratified by the directors at a meeting within a period of two months,
- (iii) that the amendment of this section should not extend to contracts already in existence

Provided that the previous consent of the board of directors to any contracts or the ratification of contracts where they were made without the directors' previous consent should be given at a meeting of the board of directors and not by circulation of the proposal

- (b) Contracts for underwriting, or subscription or purchase of shares and debentures of the company should also be brought within the scope of this section

This section should be replaced by section 184 of the English Act but the proviso to sub section (1) of section 184 of the English Act will have to be slightly revised to suit Indian conditions

(Paragraph 111 of the Report)

The principal changes are that—

- (1) under sub section (1) of section 184 of the English Act, a director can be removed by an *ordinary* resolution,
- (2) under sub section (3) of the English section, the director concerned has the right to make a representation to the company at the company's expense,
- (3) the director concerned has the right to claim compensation for premature retirement

262

- (A) Clauses (a) and (b) of this section should be amended to read as follows (Paragraphs 102 104 of the Report)

“(a) sell or lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company

Provided that where a company owns more than one independent undertaking, the

The amendments involve the imposition of some additional restrictions on the powers of directors and these have been explained in the Report

directors shall not dispose of any such undertaking² without the consent of the shareholders by an ordinary resolution by which the shareholders may also prescribe such conditions as they think proper with regard to the use or disposal of the sale proceeds subject to the provisions of the Act regarding reduction of capital

On acquisition of undertakings by Government or by any local authority, the sale proceeds received should be invested in trust securities until the company in general meeting has decided otherwise

- (b) remit or extend the date of repayment of any debt due by a director"

(B) The following proviso should be added:

"Provided that nothing herein shall affect the right of a buyer or lessor to buy or take lease of the undertaking in good faith"

(C) The borrowings by the directors of a company should not exceed the subscribed capital plus the free reserves of the company, without the consent of the general meeting, but this should not affect borrowings made before the commencement of the Act which exceed this amount but are presently within the power of the directors to make

(D) No rigid rule should be laid down as regards the method of payment of directors' fees, i.e., the company should be solely entitled to decide whether they should be paid by way of monthly (Paragraph 87 of the Report)

remuneration or by way of fees for attending the meetings. A company managed by a managing agent should also be entitled, by a special resolution to pay to directors a commission, not exceeding in the aggregate one per cent of the net profits as defined in the Act, but this should only be allowed where remuneration received by the directors is a fee for attending the meetings, *i.e.*, this should not apply where a director is in receipt of a monthly remuneration. Such commission paid to directors shall be treated as working expense.

- (E) In the case of a company not having a managing agent any commission that is paid to directors who are not full time employees or managing directors of the company should not exceed in the aggregate 3 per cent of the net profits as defined in the Act. Here again, a special resolution would be required to sanction the payment of such commission and the Commission shall be treated as working expense. No director, other than a full-time employee or managing director, who is in receipt of any commission from a holding company should be entitled to receive any commission from a subsidiary of such holding company.

The special resolution under the above clauses (D) and (E) should not remain effective for a period exceeding 5 years.

- (F) The provisions of clauses (D) and (E) above should take effect from the day when the Act comes into force.

(G) The directors should not contribute more than Rs 5,000 per annum to any fund without the consent of the shareholders

(H) This section should not apply to private companies other than subsidiaries of public companies

(a) The grounds on which the office of director will be vacated should be tied up with the sections dealing with the appointment and disqualification of directors

(Paragraphs 92 and 93 of the Report)

(b) A further ground for vacation should be conviction for any offence which is non-bailable under the Criminal Procedure Code or any other enactment for the time being in force

(c) Another ground for vacation of office should be the attainment of the age limit of 65

(d) Sub-section (2) of this section should apply only to private companies other than private subsidiaries

(e) Substitute the following for sub-clause (d) of sub-section (1) of this section

“if he or the private company of which he is a director fails to pay calls made on him or such private company in respect of shares held by him or such private company within six months from the date of such calls being made, or”

at, A new section should be inserted to provide that — (Paragraph 109 of the Report).

(i) a meeting of the board of directors should be held at least once in two months, but where a meeting of the board of directors cannot be held for want of quorum, that should not be taken to mean that the

"No remuneration payable by the company to any officer, employee or servant should be tax-free"

Section 189 of the English Act prohibits tax-free payments to directors

New Sections

Sections on payment to director for loss of office, etc

New sections should be inserted on the following lines

- (i) No compensation shall be payable to a director of the company, provided, however, that this shall not be construed to prohibit payment to a managing director or manager for loss of office in his capacity as such managing director or manager or to prohibit the payment of any remuneration to him for any other service rendered by him under the company
- (ii) Section 192 of the English Act should be adapted with the specific provision that no compensation should be payable by the company
- (iii) Section 193 of the English Act should be adapted but it should be made clear that no payment is to be made by the company

(Paragraph 89 of the Report)

Section 191 of the English Act regulates payment of compensation by a company to directors for loss of office, etc

Section 192 similarly requires the approval of a company for any payments to directors in connection with the transfer of any of its property to them for loss of office, etc

Section 193 imposes a duty on directors to disclose payments for loss of office, etc, made in connection with the transfer of shares in a company

Section 194 provides for some supplementary measures for the recovery of any payment which may have been made in contravention of sections 191, 192 and 193

267

New Section

Register of directors' shareholdings, etc

A new section similar to the provisions of section 195 of the English Act should be inserted with the addition of the following clause

"It shall be the duty of every director of a company, and of every person deemed to be a director to give notice to the company of such matters relating to himself as may be necessary for the purposes of

(Paragraph 100 of the Report)

This new section provides for the maintenance of a register by every company showing the holdings of shares in or debentures of a company or its subsidiary or holding company by the directors of a company—whether such shares or debentures are held by or in trust for them

87A

Duration of appointment of
managing agents

this section Any such notice shall be in writing and if it is not given at a meeting of directors the person giving it shall take reasonable steps to secure that it is brought up and read at the next meeting of directors after it is given Any person who makes default in complying with the provisions of this sub section shall be guilty of an offence and liable on conviction to a fine not exceeding five thousand rupees or imprisonment not exceeding two years or to both fine and imprisonment”

The additional clause proposed to be inserted is based on the recommendations of the Millin Commission (pp 53 54) and requires a director to disclose information of his holdings in a company or its subsidiary or holding company and provides penalty for failure to do so

Sub section (1) —Add the words “managing director” after the word “director” in the second line of this sub-section (Paragraph 112 of the Report).

Under clause (b) of this sub section it should be added that where a corporation has nominated a director, the particulars of both the nominating company and the nominated director should be given

Sub-section (2) (i) —For practical convenience it is necessary to provide under this sub section that changes to be notified to the Registrar in the director, manager or managing agent or any other particulars contained in the register to be kept under section 87 should be recorded in a separate This suggestion will obviate the necessity of repeating wholesale changes in the particulars to be supplied under this section every time if a small change occurred containing information about all directorships

register with the Registrar of Joint Stock Companies and that this register should be open to inspection on the payment of usual charges

Sub section (2) (u)—The period of 14 days prescribed in this sub-section should be extended to 28 days

A new sub-section should be added imposing an obligation on directors to disclose such particulars as are necessary for the purposes of this section within 20 days of the acceptance of any other directorship by them. Section 87 should also contain a sub-section for a default fine not exceeding Rs 500

Managing Agents

(a) *Sub sections (1) & (2)*—These two sub sections (Paragraph 117 of the Report) should be recast to provide that—

(i) as regards future managing agency agreements, the period of appointment in the first instance should be 15 years and the period of renewal of the agreement should be limited to 10 years at a time,

(ii) no renewal or re appointment or extension of the term of appointment of a managing agent should be made except during the last 24 months of the agreement due to expire

A suitable explanation of the term "re appointment" should be added under which re-appointment should mean the appointment of persons having the same or substantially the same interest in the outgoing managing agency, but nothing in the explanation should prevent the re-appointment of

87B

Conditions applicable to managing agents

any person or persons provided such re-appointment does not extend beyond the duration of the original term ,

- (iii) As regards existing agreements they should all expire on the 15th August 1959 unless they expire before that date, and the terms of remuneration prescribed under the new Act should apply to all such agreements after the Act has been in force for two years (Paragraph 118 of the Report)

Should a managing agent, however, within a period of one year from the passing of the Act be prepared to bring his terms of remuneration in line with the provisions of the Act as from the commencement thereof, with the agreement of the company, he should be eligible for reappointment for a period of ten years as from the date of such reappointment and the original agreement will automatically stand cancelled

Notwithstanding the terms of any contract that may subsist in regard to the duration of the contract and the remuneration, all other terms should be effective as in the new Act from the date on which the Act comes into force ,

- (w) private managing agency companies should not themselves be managed by managing agents. (Paragraph 110 of the Report)

(b) *Sub section (4)*—It should be provided that the word 'remuneration' in this sub-section should not include compensation

Clause (a)—This clause should be amended to provide that—

- (i) the following ground should be added to the grounds for dismissal specified in this clause "for fraud or breach of trust or gross negligence or gross mismanagement",
- (ii) a managing agent can be removed for fraud or breach of trust by an ordinary resolution while a special resolution will be required in all other cases to remove a managing agent,
- (iii) a managing agent can also be removed by an ordinary resolution for fraud or breach of trust committed by him in respect of any other company under his management which has been proved in a Court of law,
- (iv) no resolution should be required to dismiss a managing agent who has been convicted of an offence specified in clause (a). On such conviction, his office should be automatically vacated subject to the proviso that vacation should not take place (i) if the offending member, director or officer of the managing agency company or firm, as the case may be, is expelled or dismissed by the managing agent within 30 days from the date of the conviction or (ii) if his conviction is set aside on appeal

Provided that where an appeal is presented against conviction, the directors should have the power to require the managing agent to suspend

(Paragraph 119 of the Report)

The question whether a managing agent should be removed by an ordinary resolution or a special resolution for fraud or breach of trust or gross negligence or gross mismanagement was not free from difficulty. It was, however, felt that an ordinary resolution should suffice for removing a managing agent who was found guilty of fraud or breach of trust in relation to the affairs of the company and for cases covered by item (iii) but a special resolution should be required in all other cases

the offending member, director or officer concerned and in the event of the managing agent not complying with this requirement within a period of 30 days the directors shall have the power to suspend the managing agent up to the final disposal of the appeal

For the purposes of this clause, any two directors should have the power to call a general meeting of the company and the managing agent should also have the right to make a statement orally or in writing to the shareholders explaining his position,

Clause (c) —Should be replaced by the following (Paragraph 120 of the Report).
 “a transfer of office by a managing agent shall be void unless approved by the company by a special resolution”

The present section requires only an ordinary resolution

At the end of clause (c) the following provision should be made

“Where a managing agent resigns, the directors (Paragraph 121 of the Report)

of the company shall prepare a statement of the affairs of the company as on that date along with a balance sheet and profit and loss account according to the requirements of the Act made up as on that date and for the period ending on that date and obtain a report from the auditors of the company on such balance sheet and the profit and loss account according

There is no such provision in the present Act, with the result that some managing agents have resigned, by collusive arrangements with their successor or the directors of the company, without rendering accounts to the company

to the requirements of the Act The resignation of the managing agent shall be considered along with such statement of affairs, balance sheet, the profit and loss account and the auditor's report Until then the resignation shall not be effective The acceptance of resignation of a managing agent under the above circumstances will not, however, affect his rights other than as managing agent or liabilities, *vis-a-vis* the company In a case where a managing agent is removed, he should have the right to enforce any claim he has against the company subject to any counter claim the company may have against him "

The proviso to this clause should be replaced as follows (Paragraph 119 of the Report).

- (i) In the case of a managing agent which is a public company and whose shares are officially quoted on a recognised stock exchange, the exemption granted by section 87BB should continue, i.e., there should be no restriction imposed on the transfer of shares in such a company although Government should continue to have the power of withdrawing such exemption in any case where they are convinced that the exemption is being abused

- (ii) As regards firms and companies other than public companies as defined above which (Paragraph 122 of the Report).

act as managing agents, there should be a schedule to the Act providing—

- (1) that every managing agency firm and company to which the schedule applies should file with each company under its management at the time the managing agency agreement is executed a declaration stating the names of the partners of the firm and their respective interests in the firm and the interests of the co-sharers, if any, in the managing agency remuneration or, as the case may be, the names of the shareholders of the managing agency company and their respective shareholdings, as at the date of the agreement. In the latter case the declaration should further indicate whether the shares held are held beneficially, and if not, the parties on whose behalf they are held, and should further state that there is no arrangement whereby the control of the managing agency company is vested in persons other than the registered or beneficial holders. Such declaration should be signed by a partner or director of the firm or company. In the case of managing

agency agreements in existence on the date the Act comes into force the declaration should be filed within three months of that date giving the particulars as on the date the Act comes into force,

(2) similarly, a declaration so signed should be filed with each managed company on any change of partners in the firm or co sharers or sale or transfer of shares in the company giving details of such change or of the shares sold or agreed to be sold or transferred, and the names of persons foregoing the old and acquiring the new interest in the firm or transferring and acquiring the shares sold or agreed to be sold,

(3) that the declaration to be made under (1) and (2) above should be available for inspection at all times during working hours by shareholders of the managed company The shareholders should be entitled to copies of the same on payment of the prescribed fee,

(4) that the managing agency agreement should automatically and immediately expire if—

(a) in the case of a managing agency

firm the collective shares of the persons who were the original partners at the date the managing agency agreement was entered into are at any time during the continuance of the agreement reduced to less than a moiety of their collective shares at the date of agreement,

(b) in the case of a managing agency company, the voting rights attaching to the shares held collectively by the persons, who were beneficial shareholders in the managing agency company at the date when the managing agency agreement was entered into, at any time during the continuance of the agreement falls below fifty one per cent of the total voting rights attaching to the subscribed capital of the company For the purpose of this clause, the qualified voting rights attached to preference shares under the Committee's recommendations on section 49 and any voting rights which may be attached to debentures should

be included in computing the
total voting rights in the com-
pany

Clause (e)—Should be amended as in the redraft
given in the Addendum (Item 12) (Paragraph 124 of the Report)
This redraft limits the amount of
compensation payable to the manag-
ing agent under this clause.

Clause (f)—Should be amended to provide that— (Paragraph 119 of the Report)

(i) the appointment of a managing agent
and the renewal of his agreement should
be by ordinary resolution,

(ii) removal of a managing agent for fraud
or breach of trust in relation to the com-
pany or for fraud or breach of trust com-
mitted by him in respect of any other
company under his management which
has been proved in a Court of law should
also be by an ordinary resolution,

(iii) removal of a managing agent for gross
negligence or gross mismanagement should
be by a special resolution,

(iv) the variations of a managing agent's con- (Paragraph 123 of the Report)
tract should be by a special resolution un-
less such variations are made with the pur-
pose of bringing the terms of the contract
in line with the provisions of the future
Act in which case an ordinary resolution
would suffice

(2)

(3)

ng This section should be amended as in the redraft given (Paragraphs 125-130, 132 and 133 the
in the Addendum (Item 13), subject to the Note Report)
appended to it

Clause (1) of this redraft replaces existing sub-sections (1) and (2) Clause (2) defines net profits and replaces existing sub-section (3), clause (3) is new and clause (4) provides that the revised terms of remuneration shall apply to all companies after two years have elapsed from the date of the commencement of the Act but a managing agent who elects to bring the terms of appointment in line with the provisions of the new Act within a period of one year from its commencement, shall be entitled to the new terms of remuneration from the date on which the new terms of appointment are brought in line with the provisions of the Act

The principal changes made in these amendments are as follows—

- (i) limitation of remuneration payable to a managing agent in respect of his services as a

managing agent or otherwise to $12\frac{1}{2}\%$ of the net annual profits,

(ii) provision for additional remuneration in special cases by a special resolution of the company which must be approved by the Central Authority as being in the public interest,

(iii) in the event of absence or inadequacy of profits the amount payable to a managing agent as remuneration should be limited to a maximum figure of Rs 50,000/-,

(iv) subject to this maximum the actual amount of minimum remuneration in the event of absence or inadequacy of profits should be such as is considered reasonable by the company at its first or subsequent annual general meeting,

(v) the basis of calculation of net profits is considerably altered,

(vi) a managing agent will not be paid any office allowance

(2)

(3)

This section should be amended as in the redraft given in the Addendum (Item 13), subject to the Note appended to it.

Clause (1) of this redraft replaces existing sub-sections (1) and (2) Clause (2) defines net profits and replaces existing sub-section (3), clause (3) is new and clause (4) provides that the revised terms of remuneration shall apply to all companies after two years have elapsed from the date of the commencement of the Act but a managing agent who elects to bring the terms of appointment in line with the provisions of the new Act within a period of one year from its commencement, shall be entitled to the new terms of remuneration from the date on which the new terms of appointment are brought in line with the provisions of the Act

The principal changes made in these amendments are as follows—

- (a) limitation of remuneration payable to a managing agent in respect of his services as a

managing agent or otherwise to $12\frac{1}{2}\%$ of the net annual profits,

(ii) provision for additional remuneration in special cases by a special resolution of the company which must be approved by the Central Authority as being in the public interest,

(iii) in the event of absence or inadequacy of profits the amount payable to a managing agent as remuneration should be limited to a maximum figure of Rs 50,000/-,

(iv) subject to this maximum the actual amount of minimum remuneration in the event of absence or inadequacy of profits should be such as is considered reasonable by the company at its first or subsequent annual general meeting,

(v) the basis of calculation of net profits is considerably altered,

(vi) a managing agent will not be paid any office allowance

but will be entitled to be reimbursed for all expenses incurred by him on behalf of a managed company and sanctioned by its directors,

(vi) a managing agent's remuneration will not be payable to him till the accounts of the company have been audited and laid before the meeting, but minimum remuneration may be paid in suitable instalments as provided by the agreement,

(vii) the new basis of remuneration to managing agents should apply to all existing companies as soon as two years have elapsed from the date of the commencement of the Act except that where a managing agent elects to bring the terms of his appointment in line with the provisions of the new Act, within one year of the commencement of the new Act (*vide* section 87A of the Act), the new basis of remuneration shall apply from the date on

which the terms of appointment of the managing agent are brought in line with the new Act.

New Section

Managing Agent not to hold office of profit in managed company

A new section should be inserted between sections 87C and 87 CC debarring a managing agent, his firm or partner or his private company or a director or manager of the private company from holding any office of profit in the managed company in respect of which he can draw separate managerial remuneration in addition to the remuneration payable to the managing agent under the agreement (Paragraph 131 of the R port)

New Section

General powers of managing agents

A new section should be inserted as in the redraft given in the Addendum (Item 14) (Paragraph 134 of the Report)

The object of this new section and schedule relating to it is to lay down the general powers of managing agents *vis à-vis* directors. The schedule attempts to summarise in a convenient form the powers to be exercised by the managing agent. The scheme of the schedule is that certain general powers of management are given to the managing agents in clauses (2) and (3). Even within the limits of these general powers certain specific powers will not be exercisable by managing agents except with the specific approval of the directors of the company. These powers are set out

in clause (4) of the schedule. It is, therefore, provided that in respect of general powers given to managing agents, the directors may order that they shall be exercised by the managing agents under their control and direction.

87D

Loans to managing agents . Should be amended as in the redraft given in the Addendum (Item 15) (Paragraphs 136 and 137 of the Report)

The amendments proposed in this section follow closely the amendments in section 86D and the principal changes made in it are the same as in that section.

28

New Section

Restrictions on purchases and sales and retention of commission received from third parties, by managing agents and their power to act as distributors of the managed companies

A new section to replace sub-section (5) of section 87D and to deal with commissions on sales and purchases by managing agents should be inserted to provide that—

(a) (i) in no case should the managing agent or his associate be entitled to receive commission from the managed company in respect of goods bought on behalf of the managed company, nor should the managing agent or his associate receive any commission for selling the finished products of the managed company from the managed company's

(Paragraphs 141 to 145 of the Report)

In the Committee's opinion the problem appears to fall under the three broad headings—

(i) where the managing agent is acting as the buying and/or selling agent for the managed company, commission being paid to him by the company,

factory or from the managing agent's head office';
 (ii) the company should, however, be entitled to appoint the managing agent or his associate to be its distributor for the sale of its products at any place outside the State in which such products are manufactured or the managing agent's head office is situated provided that the managing agent already maintains his offices in the other parts of the country or outside the country for his own business and the remuneration payable to him as such distributor is in the opinion of the directors reasonable and is prescribed by special resolution appointing him as such and no other expenses are payable by the managed company,
 (iii) the period of such appointment should in no case exceed five years at a time,

(iv) particulars relating to such appointment should be entered in the register of contracts and available for the shareholders,

(v) the material terms of the proposed contract should be set out in the resolution,

(vi) the resolution should specifically provide that payment to the company for any goods, materials or property supplied by the company shall be made within a month from the date of supply

(b) (a) The managing agent should, if so authorised by an ordinary resolution of the managed company, be entitled to retain any commission or other remuneration which he may earn in his capacity as managing agent, manager, agent, secretary or distributor of any other body corporate or concern, on any goods, power, freight, repairs or other ser-

(ii) where he is acting as managing agent, selling agent, etc., for some third company and receives commission from such a third company in respect of sales made by such company to the managed company, and

(iii) where there are contracts between the managing agent and the managed company

It was felt that it was the duty of the managing agent as such to procure raw materials, etc., for the managed company. It was also felt that under normal circumstances it was the duty of the managing agent as such to sell the finished products of the managed company where sales were effected from the managed company's factory or from the managing agent's head office. It was not considered, however, that the managing agent was under any obligation to set up distributing centres for the purpose of distribution of the managed company's products. It was considered that it might be in the

VICES contracted for by him on behalf of the managed company, provided the prices charged are at market rates or are otherwise reasonable,

- (u) the details of such contracts should be entered in a separate register which should be open to inspection under the provisions of section 91A

- (c) (a) Except with the consent of the company in general meeting by a special resolution, no company shall enter into any contract with the managing agent or any partner of the managing agent, if the managing agent is a firm, or any director or member of the managing agent, if the managing agent is a private company, for the sale, purchase or supply of goods, materials or property or for the under-writing of any shares or debentures to be issued by the Company,

- (u) no such contract should be for a period exceeding three years,

- (w) the material terms of the proposed contract should be set out in the resolution,

- (w) the resolution should specifically provide that payment to the company for any goods, materials or property supplied by the company shall be

interest of the managed company that the managing agent should, in practice, act as such distributor as he had the knowledge of the products and had a greater interest in promoting sales than a third party might possibly have.

As regards the cases where the managing agent is in receipt of commission from third parties in respect of goods supplied by such parties or services rendered to the managed company, it was agreed that in many cases it might well be in the interest of the managed company that these arrangements should continue, e.g., the case of a managing agent of an electricity company which supplies power to a mill under the same management, provided that in all cases the prices charged to the managed company were in the opinion of the directors market prices or otherwise reasonable

As regards principal-to-principal contracts it was also appreciated that circumstances might arise where it

made within a month from the date of supply,
(v) the details of such contracts should be entered
in a separate register which should be open to
inspection under the provisions of section 91A

was in the interest of the managed
company that these should be allow-
ed

(d) The managing agent shall account to the managed
company for all rebates, commission or other
remuneration [other than those permissible under
(a), (b) and (c) above or remuneration allowable
under section 87C of the Act]

(e) All existing contracts between a managing agent
and the managed company or between a manag-
ing agent and a third party relating to any of the
matters mentioned in clauses (a), (b) and (c) above
should terminate not later than five years from the
date of the publication of the Report and no
future contracts on these matters should be
entered into except on the terms set out in those
clauses

87E

Loans to or by companies under
the same management

This section should be amended as in the redraft
given in the Addendum (Item 16) with the follow-
ing further provisions

(Paragraph 138 of the Report)
The principal changes made in this
section are as follows

(i) With regard to existing loans and guarantees
which go beyond the provisions of the above item
of the Addendum (Item 16) they should be brought
in line with the provisions in question within six
months from the commencement of the new Act
(ii) Similarly the existing loans and guarantees which
go beyond section 86D (loans to directors—Item
11 of the Addendum) and the existing loans, gua-
rantees and current accounts which go beyond the

(1) The grant of loans to a company
under the same management as the
lending company or the making of
any guarantee or the providing of
any security to any such company is
prohibited unless sanctioned by a
special resolution. The explanation
to sub section (1) of the redraft
attempts to define a company

provisions of section 87D (Item 15 of the Addendum) should be brought in line with the provisions of these sections i.e., sections, 86D and 87D, within six months from the commencement of the new Act.

under the same management Under the explanation companies are to be deemed to be under the same management if any person occupies in respect of these companies one or the other of the positions, namely, (i) manager, (ii) managing director, (iii) managing agent, (iv) partner of the managing agency firm, (v) member or director of the managing agency company where the managing agent is a private company or (vi) where the majority of the directors of both the companies were common to each company

(2) Exemption is provided for the making of loans by a holding company to its subsidiary or by any managing agent to any company under his management or to the giving of a guarantee or security by holding company or managing agent in respect of any loan granted to such subsidiary company or to companies under the management of the managing agent

(3) Provision is made for a penalty for contravention of this section with the proviso that where any loan

made in contravention of this section has been partially repaid, the penalty will be proportionately reduced

Purchase by company of shares of company under same management

(a) This section should be amended to provide that—

(1) the directors of a managed company by the unanimous consent of all directors for the time being present in India should be entitled to invest up to but not exceeding *10 per cent* of the subscribed capital of the company in which the investment is to be made and not exceeding *20 per cent* of the subscribed capital of the investing company in a "particular group" For the purposes of this section the phrase "particular group" should be defined as meaning and including in relation to any company making an investment —

(1) the managing agent of the investing company if such managing agent is a company,

(2) any company in respect of which the same person occupies both as regards the investing company and such other company one or other of the following positions, namely, manager or managing director or managing agent or partner of the managing agency firm or member or director of the managing agency company where the managing agent is a private company,

(3) any company a majority of whose directors comprise a majority of the directors of the investing company,

(Paragraph 139 of the Report)

The principal changes made are as follows

(1) A limit is imposed on the amount of investment which companies within a particular group can make in the shares of the other companies in that group

(2) This limit is fixed at *10 per cent* of the subscribed capital of the company in which the investment is to be made and not exceeding *20 per cent* of the subscribed capital of the investing company in the particular group

(3) An attempt has been made to define "particular group"

- (u) where either of these limits was to be exceeded the sanction of the company in general meeting by a special resolution should be obtained,
- (uu) all non-investment companies should annex to their balance sheets a list of companies within their particular group in which investments have been made,
- (w) the resolution of the board to make such an investment as contemplated in this section should be passed only at a board meeting and not by circulation, and a special notice of the proposed resolution must be circulated to all directors for the time being present in India
- (b) It should be provided that this section does not apply to a private company unless it is the subsidiary of a public company or to banking and insurance companies but the section should apply to investment companies. This section should not affect existing investments or apply to the investments by holding companies in their subsidiary
- (c) It should be further provided that this section should take effect from the date of publication of the Committee's Report
- (d) The section should not apply to investments by managing agents in companies managed by them

87G

Restriction on managing agent's, May be omitted
power of management,

In view of the provisions of the new sections 86CC and 87CC it is unnecessary to retain this section,

Managing agent not to engage in business competing with the business of managed company

Should be amended as in the redraft given in the Addendum (Item 17)

(Paragraph 140) of the Report
The principal changes made in these amendments are as follows

- (1) an explanation of the words 'on his own account' i.e. what constitutes business by a managing agent on his own account Under sub-section (-) of the redraft of the section a partnership firm, a public company or a private company over which the managing agent exercises control to the extent indicated in the sub-section are all covered,
- (ii) contravention of the provisions of this redraft is made penal but any profits or benefits which a managing agent receives from such business will be deemed to be held by him in trust for the company of which he is the managing agent

239

New section

Prohibition of stipulations requiring the appointment of the same managing agent for the transferee companies on transfer or amalgamation

A new section should be inserted prohibiting the existing practice of inserting in managing agency agreements clauses forbidding the amalgamation or reconstruction of companies unless the old managing agents were reappointed managing agents of those amalgamated or reconstructed companies

The Committee is of opinion that any such clause requiring the old managing agents to be reappointed managing agents of the companies which are proposed to be reconstructed or amalgamated would be generally against the interests of the companies which are proposed to be

-
- (ii) where either of these limits was to be exceeded the sanction of the company in general meeting by a special resolution should be obtained,
 - (iii) all non-investment companies should annex to their balance sheets a list of companies within their particular group in which investments have been made,
 - (iv) the resolution of the board to make such an investment as contemplated in this section should be passed only at a board meeting and not by circulation, and a special notice of the proposed resolution must be circulated to all directors for the time being present in India
- (b) It should be provided that this section does not apply to a private company unless it is the subsidiary of a public company or to banking and insurance companies but the section should apply to investment companies. This section should not affect existing investments or apply to the investments by holding companies in their subsidiary
- (c) It should be further provided that this section should take effect from the date of publication of the Committee's Report
- (d) The section should not apply to investments by managing agents in companies managed by them

87G

Restriction on managing agent's . May be omitted
power of management,

87H

Managing agent not to engage in
business competing with the
business of managed company

Should be amended as in the redraft given in the
Addendum (Item 17)

New Section

Prohibition of stipulations re-
quiring the appointment of
the same managing agent for
the transferee companies on
transfer or amalgamation

A new section should be inserted prohibiting the
existing practice of inserting in managing agency
agreements clauses forbidding the amalgamation
or reconstruction of companies unless the old
managing agents were reappointed managing agents
of those amalgamated or reconstructed companies

(Paragraph 140 of the Report)
The principal changes made in these amendments are as follows

- (1) an explanation of the words 'on his own account' i.e. what constitutes business by a managing agent on his own account Under sub section (-) of the redraft of the section a partnership firm, a public company or a private company over which the managing agent exercises control to the extent indicated in the sub section are all covered ,
- (2) contravention of the provisions of this redraft is made penal but any profits or benefits which a managing agent receives from such business will be deemed to be held by him in trust for the company of which he is the managing agent

289

The Committee is of opinion that any such clause requiring the old managing agents to be reappointed managing agents of the companies which are proposed to be reconstructed or amalgamated would be generally against the interests of the companies which are proposed to be

reconstructed or amalgamated and, therefore, objectionable in principle. The interest of the managing agents must be subordinate to and not prevail over the interest of the principal companies.

871

Limit on number of directors appointed by managing agent Should be amended as in the redraft given in the Addendum (Item 18) (Paragraph 84 of the Report)

Manager and Managing Director

New Section

Appointment and terms of office of manager and managing director A new section as in the draft given in the Addendum (Item 19) should be inserted (Paragraph 146 of the Report)

The principal changes made in these amendments are as follows

- (i) No firm or body corporate can be appointed as manager
- (ii) No person shall be appointed as manager or managing director for a second company except with the unanimous resolution of the directors passed at a board meeting

(iii) Certain disqualifications are imposed on persons who can be appointed as managers

(iv) The term of appointment of a manager or managing director should not exceed 5 years at a time

(v) No agreement employing any person, firm or body corporate to any office or place of profit in a company should be made for a period of more than 5 years at a time

(vi) If a company wants to pay commission to managing directors based on net profit the calculation of net profits should be the same as in section 87 C

291

New Section

investments of company to be held in its name

A new section should be inserted after section 88 to provide that all investments held by a company should be registered in the name of the company, the only exception being the qualification shares required to qualify a nominated director of a company, but such shares should be in the possession of company or its bankers

The Committee considers this specific provision in the Act necessary as it would reduce the temptation to misuse the investment of the company

91A

Disclosure of interest by director This section should be amended as follows

(Paragraph 96 of the Report)

(a) *Sub-section (1)*—Sub-section (3) of section 199 of the English Act should be introduced as a second proviso to this sub-section Compare section 199 of the English Act This section should be read with section 86F The section should be inserted in the group of sections dealing with directors

(b) *Sub-section (5)* of section 199 of the English Act should be incorporated in this sub-section The principal changes suggested by the amendments are as follows —

(c) Provision for giving of annual notice of directors' interest in accordance with the proviso 3 to section 48 of the Draft Bill at page 124 of the Milln Commission's report should be made under this sub-section

(1) The general notice of his interest in any contract or arrangement with any firm or company which any director is entitled to give under the proviso to sub-section (1) must be given at a meeting of the directors or the director concerned should take reasonable steps to secure that it is brought up and read at the next meeting of the directors after the notice is given [Vide pro-

(d) *Sub-section (2)*—The penalty prescribed in sub-section (2) should be enhanced to Rs 5,000

(e) *Sub-section (3)*—Should be so extended as to entitle a shareholder to demand a copy of the register on payment of a fee of six

annas for every 100 words or fractional part thereof

viso to sub section (3) of section 199 of the English Act]

(2) Nothing in the provisions of this section should affect the operation of any rule of law restricting directors of a company from having any interest in contracts with the company

(3) The general notice under the proviso to sub section (1) should be given annually and remain effective only up to the date of the next annual general meeting, *vide* proviso 3 to section 48 of the Draft Bill at page 124 of the Milhn Commission's report

(f) *Sub section (3-A)*—Add a new sub section 3-A which should provide for the register to be placed before the meetings of the board and be signed by each director present at the meeting (Paragraph 97 of the Report)

91B

Prohibition of voting by interested director

(a) *Sub-section (1)*—This sub section should be amended to provide that a director shall not take *any part* in the proceedings of the meeting of (Paragraph 98 of the Report) That the interested director should not participate in the proceedings of a meeting of a board at which the con.

a board of directors at which a contract in which he is directly or indirectly concerned or interested is being discussed and voted upon

tract in which he is directly or indirectly concerned or interested is being discussed is an obvious safeguard against malpractices. A further point whether such a director should be required to withdraw from the meeting of the board at which the subject is discussed raised some points of propriety and the Committee decided that the interested director might sit at the board meetings but should not be entitled to vote on such cases

284

(b) Proviso to this sub section should be modified as follows

“Provided that this sub section shall not apply to

- (i) any contract or indemnity against any loss which they or any one of them suffer by reason of becoming or being sureties or surety for the company, or
- (ii) any contract or arrangement with any other public company in which the interest of the director in such other public company consists solely in his being a director thereof and the holder of not more than the number of shares in such other public company requisite to qualify him as a director

(c) *Sub section (2)*—The penalty prescribed under this section should be increased to a fine of Rs 5,000

91C

Disclosure to members in case of contract appointing a manager

(a) The scope of this section should be extended to contracts or arrangements for the appointment of managing directors
(b) It should also be provided under sub section (1) of this section that every member of the company concerned shall be entitled to call for a copy of the contract in question on payment of a fee of six annas per hundred words or fraction thereof

(Paragraph 99 of the Report)

The suggestion follows the general line that the position of a director in this matter should be the same as that of a manager or a managing agent

91D

Contracts by agents of company in which company is undisclosed principal

Sub section (2) should be amended as follows

“Every such manager or other agent shall forthwith deliver the memorandum afore said to the company and send copies to the directors. Such memorandum shall be filed in the office of the company and laid before the directors at the next directors’ meeting to be held within a period of not more than one month from the date of such contract”

It is not necessary to provide in this sub section that the directors’ meeting before which the memorandum mentioned in sub-section (2) should be laid should be held not more than one month from the date of the contract, otherwise, the object underlying this provision will be largely defeated.

92 to 102

Prospectus,

Sections on Prospectus

These sections should be amended as in the redrafts given in the Addendum (Item 20) which are (Paragraphs 53 to 69 of the Report)

based largely on sections 37 to 51 of the English Act as read with the Fourth and Fifth Schedules to that Act and the recommendations in the Millin Commission's report. In the section of the redraft dealing with liabilities of directors, etc., in the prospectus, the provisions of section 12 of the (British) Prevention of Fraud (Investment) Act, 1939, which penalises the reckless making of any statement, promise or forecast which is misleading, false or deceptive and thereby induces a person to subscribe to an issue of capital are incorporated.

A separate schedule corresponding to the Fifth Schedule to the English Act setting out the matters to be disclosed in a statement in lieu of a prospectus will also have to be prepared.

Sanction to the issue of capital should be accorded by the Controller of Capital Issues subject to the condition that the prospectus conforms to the provisions of sections 92 to 102 of the Indian Act.

The principal changes are

- (i) an appreciable enlargement in the requirements as to the particulars which should be disclosed in a prospectus. These particulars are included in a schedule to the redraft instead of being inserted in the Act itself as in the present section 95 of the Indian Companies Act ,
- (ii) the insertion of a new section in the Indian Act requiring the previous consent of experts to the citation of their opinion or views in a prospectus issued to the public ,
- (iii) the insertion of a requirement in the Indian Act that copies of all material contracts entered into by the promoters, vendors or others during the two years prior to the date of the issue of a prospectus should be annexed to it ,
- (iv) the insertion of a new provision in the Indian Act that

no prospectus should be issued more than ninety days after the date on which it was delivered to the Registrar ,

(v) the tightening up of the conditions laid down in section 92 of the Indian Companies Act for the registration of a prospectus ,

(vi) the tightening up of the provisions of section 101 of the Indian Companies Act relating to "minimum subscription" ,

(vii) the insertion of a provision in the Indian Act on the lines of section 50 of the English Act, 1948, fixing the time for the opening of subscription lists The Committee has suggested in its redraft that the time should be five days after the issue of a prospectus ,

(viii) the insertion of a provision in the Indian Act requiring the promoters to apply to a recognised stock exchange for permission to deal in the shares and debentures within

ten days of the first issue of the prospectus, in which a promise was made that such an application would be made. If no such application is made or permission to deal is refused by the authorities of the stock exchange concerned before the expiration of three weeks from the date of the closing of the subscription lists the moneys received from the subscribers should be refunded to them forthwith.

New Section

Construction of reference to § A new section corresponding to section 55 of the One of the methods by which savings offering shares or debentures, English Act should be inserted are attracted from the public is to the public

through "placings" by a broker's or issuing office or investing syndicates. While it will be hard to provide statutorily that every placing must be deemed to be an offer for sale, such placings as are to all intents and purposes "offers to the public" should be brought indispu-

tably within the provisions of the Act (*vide* recommendations of the Cohen Committee) The object of this section is to cover such placings

Allotment

103

Restrictions on commencement of business

Sub-section (1)—The provisions of section 109 (1) (c) of the English Act should be incorporated under this sub-section

The amendment provides that no company can commence business till it has made sure that no money is liable to be repaid to applicants for any shares or debentures which have been offered for public subscription by reason of failure to obtain permission for the shares or debenture to be dealt in on any Stock Exchange

104

Return as to allotments

Sub-section (1)—A separate clause under this sub-section should be inserted to deal with bonus shares and to distinguish them from shares issued otherwise than for cash It should be laid down that no contract need be filed in respect of bonus shares

Commissions and Discounts

105

- Power to pay certain commissions and prohibition of payment of all other commissions, discounts, etc
- (a) The rate of commission mentioned in sub-section (1) of this section should not exceed 10 per cent
- See section 53 of the English Companies Act
- (b) A new sub section should be added to provide for a penalty in cases of infringement of this section
- The maximum penalty should be a fine of Rs 500

New Section

- Application of Premiums received on issue of shares
- A new section similar to the provisions of section 56 of the English Act should be added after section 105 and before section 105 A of the Indian Act
- There is no specific provision in the Act regarding the application of premiums received on the issue of shares with the result that misuse of the funds thus collected has not been lacking. The object of this new section is to lay down specifically how the premiums collected on the issue of shares should be utilised

105B

- Issue of redeemable preference shares
- (a) The penal provision in sub section (2) of this section should extend to the whole section and therefore, should be shown under a separate sub-section (3)
- (b) Sub section (3) of section 58 of the English Act should be incorporated

Further issue of capital

Should be amended as in the redraft given in the (Paragraph 52 of the Report)
Addendum (Item 21)

The redraft is based on the considerations set out in the judgment of the Supreme Court in a Bombay Life Insurance Company case

Statement in balance sheet as to
commissions and discounts

May be deleted as information sought to be disclosed
in this section must be disclosed in the statutory
form of balance sheet

Payment of Interest out of Capital

Power of company to pay interest out of capital in certain cases

Sub section (7) should be deleted

The requirements of this sub section can be more properly dealt with in the accounts provisions of the Act

Certificates of Shares, etc

Limitation of time for issue of certificates

(a) *Sub section (1)*—Should be replaced by the provisions of sub section (1) of section 80 of the English Act subject to the stipulation that a company should be entitled to a period of three

The principal change made in sub section (1) of section 80 is the explanation given of the expression 'transfer' which for the purposes

months after the allotment or from the time a valid transfer has been lodged within which to deliver the certificates

of this sub-section means a transfer duly stamped and otherwise valid and does not include such a transfer as the company is for any reason entitled to refuse to register and does not register

(b) *Sub-section (2)*—The default fine under this sub-section should be Rs 500 per day instead of Rs 50 per day

New Section

Certificate to be evidence of title

A new section similar to the provisions of section 81 of the English Act should be inserted

Section 81 of the English Act provides that the certificate of the company shall be *prima facie* evidence of title to the shares

303

Information as to Mortgages, Charges, etc

109

Certain mortgages and charges to be void if not registered

(a) A separate clause should be inserted under sub-section (1) requiring a charge on calls made but unpaid to be registered

Compare section 95 (2) (g) of the English Companies Act

(b) A comma should be inserted after the word "pledge" in sub-section (1) (e)

(c) The word "British" in this section should be deleted and the explanation in sub-section (2) should also be deleted

(d) Government should consider the question of the amendment of the Indian Registration Act as suggested in paragraph 226 of the Report (Paragraph 226 of the Report)

Registration of satisfaction of mortgages and charges . Provision should be made in this section for the entry in the register of mortgages of part payment or satisfaction of a charge Compare section 100 of the English Act

Right to inspect the register of debenture-holders and to have copies of trust deed, (a) Sub section (2) should be amplified to enable a member of the company to obtain from the company, on payment, a copy of any trust deed securing debentures Self- explanatory

(b) Sub-section (3)—Powers should be given to Courts under this section to compel the supply of a copy of the debenture trust deed where the company has refused to supply

(c) The penalty clause under this section should apply only to officers of the company who were in default

New Section

Company not to issue debentures with voting rights A new section should be inserted prohibiting a company from issuing debentures with voting rights (Paragraph 227 of the Report)

New Section

Liability of trustees for debenture-holders A new section on the lines of section 88 of the English Act should be incorporated (Paragraph 228 of the Report)
This section prevents debenture trustees from escaping their liability where they do not show the degree of care and diligence required of them under the trust deed (Both the Cohen Committee and the Miln

Commission recommended the insertion of this provision)

Statements, Books and Accounts

130 to 135

Sections on accounts.

These sections should be amended as in the redrafts given in the Addendum (Item 22)

The principal changes made in the accounts provisions have been explained in paragraphs 147 to 170 of the Report

New Section

Managing agent and others to give information required to be disclosed in accounts

A new section should be inserted making it obligatory for managing agents and others to give information to the company or its auditors in respect of particulars and information required to be disclosed in accounts

(Paragraph 159 of the Report)

New Section

Construction of references to documents annexed to accounts

A new section on the lines of section 163 of the English Act should be inserted.

The object of this section is to exclude the directors' report or the auditors' report from the documents which are ordinarily annexed or required to be annexed to a company's accounts. If, however, these reports contain such information as is required to be disclosed in the accounts of a company, they should be annexed to the accounts

Investigation by the Registrar

137 to 143

Sections on investigation and

These sections should be replaced by the provisions

(Paragraphs 190 to 197 of the Report)

The powers conferred on the Board of

of sections 164 to 171 of the English Act, which should be suitably adapted to meet the circumstances of this country, in particular,

- (1) reasonable information as mentioned in sub clause (b) (3) of section 165 of the English Companies Act, 1948, would include all such information relating to the calculation of managing agent's commission on "net profits" under the terms of section 87C of the Indian Companies Act which has been recommended for adoption,
- (2) the power given to an inspector to investigate the affairs of a company under these sections should also extend to the investigation of the affairs of the related managing agency Company so far as may be necessary for the purposes of his investigation of the affairs of the managed company,
- (3) the word 'officers' appearing in section 167 of the English Act should be elaborated by means of an explanation to include directors and partners of the managing agent of a company where the managing agent is a company or partnership as the case may be,
- (4) wherever the words "Board of Trade" occur in the English sections, they should be replaced by the words "Central Authority",
- (5) section 169 of the English Act should be amplified so as to enable proceedings to be taken thereunder against the managing agent of a company and the directors and officers of such managing agent,

Trade in England under sections 164 to 171 of the English Act are considerably more extensive than those contained in sections 137 to 143 of the Indian Act. Not only can the Board of Trade initiate investigations into the affairs of a company on the application of a specified number of shareholders (164) but can also do so on their own motion where—

- (a) the company by a special resolution, or
- (b) the Court by its order, or
- (c) the Board of Trade as a result of information received by them or informal enquiries conducted by them consider that such investigations should be held (165)

The powers of the investigators are also considerably enlarged (166). Inspectors are also empowered to call for documents, examine officers and agents of a company on oath and to examine such other persons as they consider necessary, provided the Court orders such examination (167). On an inspector's report the Board of Trade can initiate criminal action or move the Court for winding up the company and/or file a suit in Court on

- (6) there should be a new provision either among the investigation sections or at some other place whereby a person accused of any offence under the Indian Companies Act may become a competent witness in the proceedings relating to such offence

The provisions of sections 172 to 175 of the English Act should also be incorporated subject to the following modifications —

- (1) where an application for investigation into the ownership of shares of a company is submitted to the Central Authority it should be open to the Central Authority to demand a deposit not exceeding Rs 1,000 before an investigation is ordered and where the Central Authority finds the application as frivolous or vexatious it should also be competent to recover from the applicant the cost not exceeding Rs 5,000 inclusive of the amount of deposit,

- (2) further, both in respect of the provisions of sections 164 to 171 and 172 to 175 of the English Act, where investigations into the affairs of a managing agent are considered necessary the appropriate sections of the English Act should be suitably adapted in the Indian Companies Act to permit all such investigations being carried out. In particular the power given in sub-section (3)

behalf of the company for recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation of the company or in the management of its affairs which may have been disclosed in the inspector's report or in the recovery of any property of the company which may have been misapplied or wrongfully retained (169)

Further, there is provision for the recovery of expenses of investigation under certain conditions from the persons found guilty of misconduct or misfeasance or other offences (170). Finally, section 171 of the English Act provides that inspector's report if duly authenticated shall be admissible as evidence in any legal proceeding.

of section 172 of the English Act to the shareholders of a company should extend to the investigation of the ownership of shares also in respect of the related managing agency company, and

ings. The recommendation with regard to sub clause (b) (3) of section 165 of the English Act as to giving information about managing agent's commission arises from the number of adjustments to be made in calculating the net profits for the purpose of the managing agent's commission. Consequently, it is desirable that shareholders should be entitled to obtain this information.

3) Where under this Act, any question arises as to whether any person or concern is an associate of an existing managing agent, the same prescribed number of shareholders as are entitled to make a complaint against a company should also be entitled to complain that the particular concern is an associate of the existing managing agent and that the provisions of the Act are being contravened thereby. In such cases, the Central Authority should have the power to call upon the party alleged to be an associate to make an affidavit that it is not so and on the making of such an affidavit the Central Authority should take such further action as it considers necessary. Any

The provisions of sections 172 to 175 of the English Act are designed to initiate investigation into the ownership of shares in or debentures of, a company. Here, too, the Board of Trade may act either on the complaint of a number of shareholders or of their own motion and the inspectors are given extensive powers to carry on the investigations (172). The Board of Trade also are empowered to call for information from such persons as in their opinion may be interested in shares or debentures.

Application and alteration of tables and forms, and power to make rules as to prescribed matters,

Sub sections (2) and (3) of this section should be amended so as to provide —

(a) that the compulsory regulations under Table 'A' in the First Schedule of the Act and the form of the balance sheet in the third schedule except as mentioned in our redraft of section 132 (*vide* item 22 of the Addendum) should not be altered or added to,

(b) that in regard to the other matters mentioned in the section, the forms and tables may be altered or added to by the Central Authority

The Committee has recommended in paragraph 34 of its Report that the compulsory regulations in Table A should be converted into substantive sections of the Act. If this recommendation is accepted suitable amendments to this section will have to be made. If, however, this recommendation is not accepted, sub-sections (2) and (3) of this section would have to be amended as shown in column 2

Arbitration and Compromise

Power to compromise with creditors and members

Sub-section (2) Add the words "and voting" between the words "present" and "either"

The object of this amendment is to ensure that decisions in regard to compromises and arrangements are taken by a majority of three-fourths of the members present and voting in class meetings

New Section

Information as to compromises with creditors and members

A new section should be inserted incorporating the provisions of section 207 of the English Act, with the following addition
"the terms of the compromise should be included in the notice under sub section (1)"

(Paragraph 229 of the Report)

153A

Provisions for facilitating arrangements and compromises

The definition of "company" in sub section (5) of this section should be revised so as to include any company incorporated under the Act or registered under Part X for the purposes of this section

(Paragraph 230 of the Report)

Compare section 208 of the English Act. In this connection please refer to the *new section* proposed for insertion (*vide* page 9 *ante*)

153B

Power to acquire shares of shareholders dissenting from schemes or contract approved by majority

To be replaced by section 209 of the English Act

(Paragraph 231 of the Report)

Alternative remedies to winding up in cases of oppression and gross mismanagement

New Section

Alternative remedy to winding up in cases of oppression

A new section as in the draft given in the Addendum (Item 24) should be inserted

Short of winding up, this section provides a suitable remedy in cases where a company is managed in a manner prejudicial to the interests of the company or in a manner oppressive to some part of the members. The provisions of this section are analogous to section 210 of the English Act and sufficient safeguards are provided so that the company in turn is not harassed by applications from individual shareholders. Fuller comments on this

and the following two new sections proposed have been given in paragraphs 198 to 202 of the Report. It may be of interest to point out that the substance of these sections has been incorporated in the new sections 153C and 153D of the Indian Companies (Amendment) Act, 1951.

New Section

Alternative remedy to winding up in cases of gross mismanagement of the affairs of a company	A new section as in the draft given in the Addendum (Item 25) should be inserted
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New Section

Disqualification of directors, managing agents, managers and others found guilty of oppression or gross mismanagement	A new section as in the draft given in the Addendum (Item 26) should be inserted. It should be provided further that proceedings under these sections should be instituted in no Court other than a High Court.
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See remarks in column (3) against the last preceding new section

Conversion of private company into public company

154

Conversion of private company into public company	(a) A penalty for making a false statement in a statement in lieu of prospectus to be provided on the lines of section 30 (4) and section 30 (5) of the	The amendments proposed have the effect of extending to a private company which is converted into a
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English Act

(b) Form II mentioned in sub section (1) should be so amended as to require disclosure of the additional information required under Part I of the Thrd Schedule to the English Act Parts II and III of the English Schedule should also apply

public company under the section, the requirements of the Third Schedule in the English Act (form of statement in lieu of prospectus to be delivered to the Registrar by a private company on becoming a public company and reports to be sent out therein), which are more stringent than those of Form II of the Indian Companies Act

PART V

Winding Up

(The provisions under this Part of the Act will require considerable readjustment so as to bring them under appropriate central heading and to eliminate avoidable repetition wherever similar provisions can be brought together in one or more sections, in particular in this part, the sections which deal with offences antecedent to or in course of winding up may be suitably brought together under a new central heading instead of being lumped together under the central heading 'Supplemental provisions'—See paragraph 222 of the Report).

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62

Preliminary

159
Nature of liability of contributory

Sub-section (1) Delete the words "by the liquidator" (Paragraph 206 of the Report)

Cf section 214 of the English Act.
The omission of these words removes an obvious contradiction between this section and section 187 of the Act and also makes the nature of the contributories' liability clear. This liability arises from the very moment calls are made

Winding up by Court

164 and 165
Winding up proceedings in Courts

(a) These two sections should be amended so as to provide that winding up proceedings in respect of

(Paragraph 207 of the Report).
The Committee considers that however convenient it may appear to be for

companies with a subscribed share capital of rupees one lakh or over should take place only in the High Courts

(b) The following provisions should also be made —

(i) Suits in respect of arrears of calls should be decided by summary proceedings

(ii) All suits by or against a company in winding up shall, notwithstanding any provision in any law for the time being in force, be instituted in the court in which the winding up proceedings are pending

winding up proceedings to be held in the District Courts, in view of the complexity of these proceedings it is desirable that such proceedings in respect of big companies, i.e. companies with a subscribed share capital of rupees one lakh or over should take place only in the High Courts. Any inconvenience likely to be caused to the parties by this amendment in law would be more than counterbalanced by other considerations

166

Provisions as to applications for winding up

(a) The proviso to (aa) of this section should be suitably amended in order to empower the Registrar of Joint Stock Companies to apply for winding up where there is —

(i) failure to hold a statutory meeting or to file a statutory report, or

(ii) where the company failed to commence business within a year from its incorporation

(b) A sub section should be inserted under this section to incorporate the provisions of sub-section (2) of Section 224 of the English Act

(Paragraphs 208 and 209 of the Report)

It is necessary that the Registrar should have the power to apply for winding up on these *additional* grounds

The need for investing the official receiver with powers to move the Court for a winding-up order in voluntary liquidation or in liquidation subject to supervision is obvious

- (c) A further sub-section should be inserted under this section to incorporate the provisions of section 224 (1) (d) of the English Act, with the modification that the 'Central Authority' should replace the Board of Trade

This sub section is intended to empower the Central Authority to move a petition for winding up if the Central Authority is of opinion on a report submitted by an inspector appointed to investigate the affairs of a company that, in the circumstances mentioned in sub-paragraph (i) or (ii) of paragraph (b) of section 165 of the English Act, it is expedient to do so. This sub section follows as a corollary to sections 165 and 169 of the English Act which the Committee proposes to adopt

Commencement of winding up by Court. To be replaced by section 229 of the English Act .

(Paragraph 210 of the Report)
Section 218 of the Indian Companies Act may be deleted in view of the adoption of Section 229 of the English Act

Power of Court on hearing petition.

- (a) A new sub section should be inserted under this section to incorporate the provisions of section 225 (2) of the English Act

(Paragraph 211 of the Report)
Amendment is consequential to section 210 of the English Act, which has been recommended by the Committee for adoption, with suitable amendments in Part IV of the Act

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(b) The provisions of section 225 (3) of the English Act should be incorporated in sub section (3) of this section.

It seems reasonable that the Court should have the alternative power of compelling delivery of the statutory report or calling of the annual meeting

171A

Vacancy in the office of liquidator.

A permanent official liquidator should be attached to each High Court exercising winding up jurisdiction and provision may be made under this section for such an appointment

(Paragraph 213 of the Report)

The marginal heading to this section may consequently be changed as follows

“Appointment of official liquidators in High Courts”

173

Power of Court to stay winding up.

Provisions similar to section 256 of the English Act should be inserted

Under the present section a Court is not empowered to require the official receiver to furnish to it a report on such matters as it may order. Nor is there any provision for any such order to be communicated to the Registrar of Joint Stock Companies The provisions of section 256 of the English Act fill up these lacunae

174

Court may have regard to wishes of creditors or contributories

This section and sections 223 and 239 which deal with consultation with creditors may be brought under the supplemental provisions of this Part of the Act and consolidated into one section in terms of section 346 of the English Act

All these three sections empower the Court to have due regard to wishes of creditors or contributories and might be conveniently consolidated into one section under the Supplemental provisions in this Part of the Act

Official Liquidators

178A

Committee of Inspection
in compulsory winding up

Sub section (1) The Court should have the power to extend the period during which the official liquidator must convene a meeting of the creditors of the company

Ordinary Powers of Court

184

Settlement of list of contribu-
tories and application of
assets

Sub section (1) · Proviso similar to the proviso to section 257 (1) of the English Act should be inserted under this sub section

The proviso empowers the Court to dispense with the settlement of a list of contributories, where it is not necessary to make calls or adjust the rights of contributories

185

194

Dissolution of company

Sub-section (2) To be replaced by Section 274 (2) of the English Act

Under the present Act a dissolution order has to be reported to the Registrar. Sub section (2) of section 274 of the English Act provides that a copy of the order must be forwarded within 14 days from the date thereof to the Registrar who shall make a minute in his books of the company's dissolution



Extraordinary Powers of Court

195

Power to summon persons suspected of having property of company *Sub section (1)* To be replaced by Section 268 (1) of the English Act The English section is more comprehensive

Enforcement of and Appeal from Orders

202

Appeals from orders . . . The words "rehearings of and" in this section should be deleted Rehearings from the orders of the Court are proposed to be abolished

Voluntary winding up

New Section

Remuneration of liquidator A new section should be inserted after section 206 (Paragraph 212 of the Report), providing that the remuneration for the liquidator should be the remuneration fixed at the time of his appointment and such remuneration should not be increased under any circumstances

207

Declaration of solvency To be replaced by section 283 of the English Act, (Paragraph 216 of the Report) with suitable modification as to punishment in sub section (3) The punishment under this sub-section should be a fine not exceeding Rs 5,000 or six months' imprisonment

Members' voluntary winding up

208 B

Power to fill vacancy in office of liquidator A sub section should be inserted under this section (Paragraph 214 of the Report) to provide for the despatch of notice to the Registrar of Joint Stock Companies of changes in the office of liquidator

New Section

Duty of liquidator to call a creditors' meeting in case of insolvency

A new section should be inserted after section 208 C of the Indian Companies Act on the lines of section 288 of the English Act

(Paragraph 215 of the Report)

This Section is intended to cast an obligation on a liquidator to call a meeting of creditors

208-E

Final meeting and dissolution

(a) A sub section should be inserted under this section to provide for a penalty of Rs 500 for contravention of the provisions of sub section (1) of the section by the liquidator

(b) Another sub section should be added to provide for the conversion of a members' meeting to a creditors' meeting on the lines of section 291 of the English Act

The effect of this sub-section would be that where a liquidator has called a creditors' meeting under the terms of the new section on the lines of section 288 of the English Act which the Committee has recommended, the winding up then would proceed as if it was a creditors' voluntary winding up

319

Creditors' voluntary winding up

209-A

Meeting of creditors

(a) *Sub-section (2)* To be replaced by section 293(2) of the English Act

This section of the English Act lays down the manner in which notice of the creditors' meeting is to be advertised

(b) Provision should be made for the filing of a copy of the resolution mentioned in sub section (1) with the Registrar of Joint Stock Companies within a



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	reasonable period of time	
	(c) Reference to sub section (1) of section 206 to be deleted	This reference as it stands is misleading
209-C		
Appointment of Committee of Inspection	Sub section (2) of section 295 of the English Act with necessary adjustments should be adopted	
209-H		
Final meeting and dissolution	Sub section (2) The penalty mentioned in this sub-section should be enhanced to Rs 500	
<i>Members' or creditors' voluntary winding up</i>		
216		
Power to apply to Court to have questions determined of powers exercised	Sub section (3) of section 307 of the English Act should be inserted under this section	The new sub-section is intended to provide for the transmission of an order of the Court under this section to the Registrar of Joint Stock Companies
218	To be deleted in view of the adoption of section 229 of the English Act in lieu of section 168 of the Indian Companies Act	As soon as the point at which the winding up proceedings may be deemed to commence has been determined, the nature of the proceedings will also have been automatically determined
Saving for rights of creditors and contributories		
220		
Power of Court to adopt proceedings of voluntary winding up		

Winding up subject to supervision of Court

223

Court may have regard to wishes of Creditors and contributories	To be consolidated into one section along with sections 174 and 239	Vide comments in column 3 against section 174
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Supplemental Provisions

New Section

Disqualification for, and corrupt inducement affecting, appointment as liquidator	Two new sections embodying the provisions of sections 335 and 336 of the English Act should be inserted before section 227 of the Indian Act	(Paragraph 217 of the Report). Section 335 of the English Act disqualifies a body corporate for appointment as liquidator, while section 336 penalises corrupt inducement in relation to appointment as liquidator
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New Section

Notification that a company is in liquidation	A new section incorporating the provisions of section 338 of the English Act should be inserted after the above section	This provision is necessary to safeguard the interests of third parties who may enter into business transactions with companies under liquidation
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New Section

Resolutions passed at adjourned meetings of creditors and contributories	A new section incorporating the provisions of section 345 of the English Act should be added after section 229	A formal provision Self explanatory,
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230

Preferential payments	<p>(a) <i>Sub section (1)</i> (a) Reference to 'Crown' should be altered</p> <p>(b) <i>Sub-sections (1) (b) and (1) (c)</i> The provisions of</p>	<p>(Paragraph 218 of the Report). The principal changes in the amendments proposed are as follows, (1) The position of clerks/servants</p>
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of declaring fraudulent 'preferment
invalid

- (b) Corresponding changes in the periods mentioned
in the Insolvency Acts will have to be made

233

Effect of floating charge . . . The period of three months mentioned in this section should be extended to twelve months

The object of this amendment is to afford greater protection to creditors, and the section, where it is applicable, merely invalidates the charge. The extension of the period to 12 months follows section 322 of the English Act

235

Power of Court to assess damages against delinquent directors, etc

(a) It should be provided for purposes of this section that directors or partners of a managing agency company or firm should be deemed to be officers of the company

(Paragraph 220 of the Report)

323

- (b) The period of limitation mentioned in sub-section (1) should be raised from three to five years
- Cf Section 333 of the English Act,

New Sections

Liability for fraud or negligence in maintenance of proper accounts

(a) New sections corresponding to sections 330, 331 and 332 of the English Act should be incorporated in the Indian Companies Act after section 236

(Paragraph 220 of the Report)

These three sections deal with matters which are not covered by the Indian Companies Act and refer to transactions (which took place before the winding up of a company) which disclose frauds by officers of companies which have gone into liquidation, negligence in the discharge of

(b) Section 331 should, however, be redrafted in the light of section 130 (4) of the Indian Companies Act

ordinary duties of the officers as regards maintenance of accounts, etc., or fraud in the conduct of the business of the company. In the last mentioned case, any person who is knowingly a party to the carrying on of the business of the company in a fraudulent manner is *personally* liable without any limitation of liability for all or any of the debts or other liabilities of the company.

237

Prosecution of delinquent directors

Substitute the words "Central Authority" for "Central Government"

Sub-section (6) of Section 237 should be so amended as to provide that if the matter is reported or referred to the Registrar under this section, he should refer the matter again to the Central Authority and if the Central Authority, after consulting the legal opinion considers that prosecution is necessary, the Registrar will then institute proceedings

The proposed amendment to sub-section (6) of this section will ensure that in this as in all other matters the Registrar of Joint Stock Companies acts under the general control of the Central Authority, the constitution of which the Committee has recommended

238-A

Penal Provisions

The provisions of section 328 (3) of the English Act should be incorporated under this Section subject to the general exemptions contained in section 455 (2) of the English Act

Section 328 (3) of the English Act provides that for the purposes of this section the expression 'officer' shall include any officer in accordance with whose directions or instructions

the directors of a company have been accustomed to act, while section 455 (2) of the same Act limits the scope of this section by excluding those persons who tender advice to directors in their professional capacity. The incorporation of the provisions contained in this section in the Indian Act will ensure that the officers of a company [subject to the exceptions made in section 455 (2) of the English Act] are also brought within the purview of the penal provisions.

239

Meetings to ascertain wishes of creditors or contributories. To be consolidated into one section along with sections 174 and 223

241

Inspection of documents. Add a sub section similar to sub-section (2) of section 266 of the English Act. This sub section is merely clarificatory but it may be useful to incorporate it under this section

242

Disposal of documents of company. (a) Provisions similar to those contained in sub sections (3) and (4) of section 341 of the English Act to be inserted. (b) The penalty under sub section (4) of Section 341 of the English Act should be Rs 5,000 or six months' imprisonment. (Paragraph 220 of the Report) Unless power is taken to frame rules regarding the destruction of books and papers, the other provisions of the section cannot be adequately enforced.

PART VI

Central Organisation, Registration Offices and Fees

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New Section

Establishment of a Commission to perform certain duties and exercise certain powers	A new section should be inserted at the beginning of this Part providing for the establishment of a Commission which may be called "the Corporate Investment and Administration Commission" to which the powers conferred and the duties imposed under this Act on the Central Authority as defined in the new clause (1 D) of section 2 (1) may be assigned
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(Paragraph 257 of the Report)

248

Registration Offices

Suitable changes should be made in this section to bring it in conformity with the administrative set up under the general supervision and control of the proposed Commission that may be decided upon

The Committee recommends the establishment of a centralised organisation for the administration of the Indian Companies Act which may be known as the Corporate Investment and Administration Commission and has been referred to as the Central Authority elsewhere in this Annexure. Under this Central Authority there will be regional registration offices,

One or more States will comprise these regions

The functions allotted to the Central Authority will be not merely those mentioned in the specific recommendations made in this Annexure but also such other functions under other Acts or Orders (e.g. Stock Exchange Regulation Act, Capital Issue Control Order) relating to the promotion, formation and working of companies which may be allotted to it by the Central Government. These recommendations have been elaborated in paragraph 260 of the Report

328

249
Fees

(a) *Sub section (1)*—Table "B" may require further modification after a decision has been taken by Government on the recommendations of the Company Law Committee. Part II of the Twelfth Schedule in the English Act should also be incorporated in Table "B"

(Paragraph 250 of the Report).

The scale of fees would require revision in the light of the obligations that are placed on the Central and the State Governments for the administration of the Indian Companies Act. Further, the provisions of Part II of the Twelfth Schedule in the English Act are necessary to prevent possible evasion by companies limited by guarantee or by unlimited companies through the device of having a small share capital

(b) Sections 249 and 260 should be suitably combined

PART VII

Application of Act to Companies formed and registered under former Companies Acts

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250

Application of Act to companies The proviso to this section should be deleted
 formed under former Com-
 panies Acts

PART IX

Winding up of Unregistered Companies

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270

Meaning of
"company"

"unregistered

(a) Reference to 1913 Act should be included under this section

(b) The question of amending this section to make it applicable to companies in Pakistan should be further considered

(Paragraph 232 of the Report)

Cf Section 2A as amended by the Adaptation, Order 1948 Presumably, Pakistan companies will be treated as foreign companies for purposes of winding up The question of amending this section so as to make it applicable to companies in Pakistan should be left to Government

331

PART X

Companies established outside India

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277 to 277E

Sections on companies established outside India

These sections should be amended as in the redrafts given in the Addendum (Item 27). The redrafts follow very closely the provisions of sections 406 to 423 of the English Act except that sections 416 and 418 are deleted.

(Paragraphs 223 and 224 of the Report.) The principal changes made in these amendments include—

(1) amplification of a variety of existing particulars about the directors and secretaries of the company, e.g., their former name, if any, residential address, nationality, business occupation, details of other directorships which they hold, etc [vide sub section (2) of section 407 of the English Act],

(2) Elaboration of the existing requirements about alterations in the char-

ters, statutes, memorandum, articles, etc., which would have to be submitted to the Registrar (409)

(3) A new requirement in replacement of sub section (3) of section 277 of the Indian Act regarding submission of accounts to the Registrar (410) This requirement provides that a foreign company shall make out a balance sheet and profit and loss account in such a form and containing such particulars as it would, if it had been a company within the meaning of the Act, have been required to make and lay before a general meeting.

(4) A new requirement that the documents which a foreign company has to supply must be submitted to the Registrar of Joint Stock Companies, *New Delhi*, in triplicate and one copy of these documents should be submitted to the Registrar of the State in which the principal business of the foreign company is carried on (compare section 413 of the English Act)

(5) Elaboration of the requirements of the prospectus of foreign companies.

PART X.A

Banking Companies

Already repealed by the Banking Companies Act.

PART XI

Supplemental

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278

Cognisance of offences

This section should be amended as in the redraft (Paragraphs 203 and 233 of the Report) given in the Addendum (Item 28)

Attempt has been made to provide against malicious prosecutions as an essential corollary to the tightening-up of the administration of the Indian Companies Act and the strengthening of the penal provisions contained in it

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New Section

Production and inspection of books where offence suspected.

A new section on the lines of section 441 of the English Act with necessary adaptations after deletion of the words "chief officer of police" in sub-sections (1) (a) and (4) should be inserted (Paragraph 234 of the Report)

281

Power of Court to grant relief in certain cases

Sub-section 3 (c), the word "Officers" should be replaced by the words "officers or persons deemed to be officers of the company" See the recommendations with regard to section 235

288

Construction of "registrar of joint stock companies" in Act XXI of 1860. This section would have to be suitably modified in the light of the new administrative set up that may be decided upon

289

Act not to apply to Banks of Bengal, Madras or Bombay Presumably this section has now become obsolete and may be deleted

289A

Application of Act to non-trading companies with purely State objects

The incorporation, regulation and winding up of non-trading corporations with objects confined to one State is an item in list II of the Seventh Schedule of the Constitution of India. Presumably it follows that the subject is one for State Governments. Nevertheless, the Committee considers that Government should consider it whether the Central Government should not be entrusted to exercise the powers over the activities of non-trading companies

290

Repeal of Acts and Savings This section will have to be suitably recast,

New Section

Indication of sections which will not apply to banks, insurance companies, electricity companies, etc

A section should also be added to indicate those sections of the company law which would not apply to banks, insurance companies, electricity companies, etc, which are covered by specific Acts relating to these subjects (Paragraph 238 of the Report)

TABLE 'A'

(Paragraphs 239 to 242 of the Report)

The Committee considers that all compulsory regulations should be incorporated as substantive sections of the Act and should operate subject to the other provisions of the Act

Amendments to some existing compulsory regulations 2 In regard to the existing "compulsory regulations mentioned in section 17 of the Act, the Committee has proposed the following amendments in respect of some of these regulations as indicated below —

Regulation 56 Demand for poll

It should be amended as per clause C(1) of the proposed section 79(1) which is item 2 of the Addendum

Regulation 66 Depositing of proxies

It should be amended so as to provide that the proxies could be lodged 48 hours before the meeting and not required to be lodged before 72 hours as in the existing regulation

Regulation 71 General powers of directors

In view of the fact that a separate section setting forth the general powers of directors has been proposed, reference to this regulation may be omitted from section 17

Regulation 78 Retirement of Directors

Should be revised as follows —

"At the first annual general meeting of the company, the whole of the directors liable to retire by rotation, shall retire from office and at every subsequent annual general meeting, one-third of such directors for the time being or, if their number is not three or a multiple of three then the number nearest to one-third shall retire from office"

[This amendment brings this regulation in line with section 83B(2), but it should not apply to a private company except a private company which is a subsidiary of a public company (cf proviso to section 17(2) of the Act)]

Regulations 80 and 81 Eligibility of Retiring Directors and filling up of vacated office

The above regulations should operate subject to section 83B(2)

Regulation 97 Payment of dividend

Should be amended as follows —

- (a) It should be provided that dividends should *not* be paid except to registered holders, to their order or to their bankers who should not, however, be required to make separate application for them
- (b) Where a dividend was declared but not paid within three months from the date of declaration every director of the company and where the company had a managing agent, every director or partner of the managing agent should be liable to simple imprisonment for one week
- (c) The penalty should, however, apply to the officers of the company who were knowingly a party to non-payment of dividend but no director who was not directly responsible for non-payment of dividend should be liable for prosecution
- (d) Suitable safeguards should be included in the regulation to provide for cases where payment could not be made by reason of the operation of any law, such as restrictions on the remittance of funds out of the country or where a shareholder had given directions to the company regarding payment which could not be complied with, or where there are conflicting claims regarding titles to the shares

Regulation 107 Profit and Loss Account

This regulation should be deleted (*Vide* paragraph 240 of the Report)

Regulation 113 Notice of Meetings

The words "addressed to him and" appearing in this regulation may be deleted

3 In addition to the existing compulsory regulations, ^{Additional} the Committee recommends that the following regulations ^{regulations} to be made in the present Table 'A' should also be made compulsory ^{compulsory}

*Regulation 4 Modification of class rights**Regulation 50 Business of the Meeting**Regulation 59 Demand for Poll on the election of Chairman and on adjournment**Regulation 75 Record of minutes of meetings, etc**Regulation 83 Increase or reduction in the number of directors*

Regulation 4 may be made compulsory subject to the following modifications —

- (1) The extraordinary resolution referred to in the regulation should be replaced by a special resolution

- (u) The statutory provisions relating to general meetings as well as those relating to general meetings contained in the articles of association of a company in so far as they are not inconsistent with the Act should apply *mutatis mutandis* to the separate general meeting referred to in the regulation

The Committee further suggests that regulation 83 should be amended as follows —

“Subject to section 83B(2), the company may, from time to time, by ordinary resolution increase or reduce the number of directors and may also determine in what rotation the increased or reduced number is to go out of office”

New compulsory regulations

4 The Committee suggests that the following new compulsory regulations may be inserted in Table ‘A’

- (1) The following new regulation may be inserted as regulation 82A (Re-election of retiring directors)

“Notwithstanding any provisions to the contrary contained in the articles of a company a person who is not a retiring director shall be eligible for election to the office of director at any general meeting if he or some other member intending to propose him has at least 10 days before the meeting left at the office a notice in writing under his hand signifying his candidature for the office of director or the intention of such member to propose him. This provision shall not apply to private companies other than the subsidiaries of public companies. This regulation should operate subject to section 83B(2) and the other provisions of the Act relating to appointment of directors”.

- (2) A new regulation on the lines of regulation 73 (Revocation of proxies) of the English Act may be adopted as a compulsory regulation as regulation 67A

ADDENDUM

TO THE

ANNEXURE

Redrafts of some existing sections in the Indian Companies Act, 1913, and drafts of some new sections proposed to be inserted in it by the Company Law Committee.

CONTENTS

ITEMS		PAGES
1	Redraft of Section	76 347
2	Redraft of Section .	79 348
3	Draft of a section which may be incorporated as Section	79A 351
4	Redraft of Section	83 35
5	Redraft of Section	83A 355
6	Redraft of Section .	83B 356
7	Redraft of Section	85 358
8	Draft of a section which may be incorporated as Section	85A 359
9	Redraft of Section	86B 360
10	Draft of a section which may be incorporated as Section	86CC 361
11	Redraft of Section	86D 362
12	Redraft of sub section (e) of Section	87B 363
13	Redraft of Section	87C 364
14	Draft of a section which may be incorporated as Section	87CC 366
	Schedule to Section	87CC 367
15	Redraft of Section	87D 369
16	Redraft of Section .	87E 370
17	Redraft of Section	87H 371
18	Redraft of Section	87I 372
19	Draft of a section which may be incorporated as Section	87J 373
20	Redraft of Prospectus Sections	92 to 102 375
	Schedule to Section	93 390
21	Redraft of Section	105C 399
22	Redrafts of Accounts Sections	130 to 135 400
	Schedule to Section .	132(2) 408
	Schedule to Section	132(3) 417
23	Redraft of Auditors Section	144 and 145 421
24	Draft of a section which may be incorporated as Section	153C 426
25	Draft of a section which may be incorporated as Section .	153D 429
26	Draft of a section which may be incorporated as Section .	153E 431
27	Redrafts of Sections on Foreign Companies .	277 to 277E 432
28	Redraft of Section , . .	278 441

1 REDRAFT OF SECTION 76 OF THE INDIAN COMPANIES ACT.

(Pages 246 and 247 of the Annexure and paragraph 73 of the Report)

76 (1) Every company shall within 18 months of its incorporation and thereafter within nine months from the end of its financial year hold a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it. Not more than fifteen months shall elapse between the date of one annual general meeting and that of the next Annual General Meeting.

Provided that the Registrar may for any special reason extend the time within which an annual general meeting shall be held by a further period not exceeding six months

Every general meeting held in accordance with the provisions of this sub-section shall be convened for a time during business hours, on a day that is not a holiday and shall be held either at the registered office of the company or within the town in which the registered office of the company is situate. For the purpose of this sub-section a day shall not be deemed to be a holiday unless it shall have been so declared under the Negotiable Instruments Act, 1881, prior to the date of the notice convening the annual general meeting of the company

(2) If default is made in holding a meeting of the company in accordance with the foregoing sub-section, the Central Authority may, on the application of any member of the company, call or direct the calling of, a general meeting of the company and give such ancillary or consequential directions as the Central Authority thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the company's articles and it is hereby declared that the directions that may be given under this sub-section include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting

(3) A General Meeting held in pursuance of the last foregoing sub-section shall, subject to any directions of the Central Authority, be deemed to be an Annual General Meeting of the company

(4) If default is made in holding a meeting of the company in accordance with sub-section (1) of this Section, or in complying with any directions of the Central Authority under sub-section (2) thereof, the company and every officer of the company who is knowingly and wilfully a party to the default shall be liable to a fine not exceeding five thousand rupees

2 REDRAFT OF SECTION 79

(Pages 248 and 249 of the Annexure and paragraph 75 of the Report)

Provisions
as to mee-
tings and
votes

79 (1) The following provisions shall have effect with respect to Meetings of a Company other than a Private Company not being a subsidiary of a Public Company and the procedure thereat notwithstanding any provision made in the Articles of the Company in this behalf

(a) A meeting of a Company may be called by not less than 21 days' notice in writing, provided that a Meeting of a Company shall, notwithstanding that it is called by shorter notice than that above specified, be deemed to have been duly called if it is so agreed—

(i) In the case of a Meeting called as the Annual General Meeting by all the members entitled to attend and vote thereat, and

(ii) In the case of any other Meeting by a majority in number of the Members having a right to attend and vote at the Meeting, being a majority together holding not less than 95 per cent in nominal value of the shares giving a right to attend and vote at the Meeting or, in the case of a Company not having a share capital, representing not less than 95 per cent of the total voting rights at that Meeting of all Members

(b) Where the business to be transacted at the Meeting relates to anything that would not be deemed to be ordinary business if transacted at an Annual General Meeting of the company there shall be annexed to the Notice of such meeting a statement setting out all material facts concerning the business to be transacted and the nature and extent of the interest (if any) of every director or managing agent or partner or director of the managing agency firm or company in such business and where any of the business consists of the approval by the Meeting of any document, specifying the time and place where such document can be inspected. Notice of the meeting shall be served on every member in the manner in which notices are required to be served by Table "A" and for the purpose of this clause the expression "Table 'A'" means that table as for the time being in force, but the accidental omission to give notice to, or, the non-receipt by any member shall not invalidate the proceedings at any Meeting

(c) (i) At any general meeting a resolution put to the vote of the meeting shall be decided on a show of

hands unless a poll is (before or on the declaration of the result of the show of hands) demanded—

- (a) by the Chairman, or
- (b) by at least 5 members present in person or by proxy, or
- (c) by any member or members present in person or by proxy and representing not less than one-tenth of the total voting rights of all the members having the right to vote at the meeting, or
- (d) by a member or members holding shares in the company conferring a right to vote at the meeting being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right

Provided that in the case of a private company, if not more than seven members are personally present, one member and if more than seven members are personally present, two members shall be entitled to demand a poll

Unless a poll be so demanded a declaration by the Chairman that a resolution has on a show of hands been carried or carried unanimously, or by a particular majority, or lost and an entry to that effect in the books containing the minutes of the proceedings of the company shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution

The demand for a poll may be withdrawn

- (11) On a poll, votes may be given either personally or by proxy or by a person duly authorized,
- (d) Where a poll is demanded the Chairman shall appoint two scrutineers to scrutinise the votes given on the poll and to report thereon to him. The Chairman shall have the power, at any time before the result of the poll is declared, to remove a scrutineer from office and to fill vacancies in the office of scrutineer arising from any cause whatsoever provided that one scrutineer shall always be a member (not being an officer or employee of the Company) present at the meeting
- (e) An instrument appointing a proxy, if in the form set out in regulation 67 of Table "A" shall not be questioned on the ground that it fails to comply with any special requirements specified for such instruments by the articles
- (f) Any share holder whose name is entered in the register of shareholders of the Company shall

be entitled at any general meeting of the company to exercise the voting rights attaching to all shares then registered in his name unless any call or other sums then payable by him in respect of any shares in the company has not been paid or the company has exercised its lien in respect of any shares held by such shareholder, but shall otherwise enjoy the same rights and be subject to the same liabilities as all other shareholders of the same class

(2) The following provisions shall have effect in so far as the articles of the company do not make other provision in that behalf —

- (a) Two or more members holding not less than $\frac{1}{10}$ th of the total share capital paid up or, if the company has not a share capital, not less than 5 per cent in number of the members of the company may call a meeting
- (b) In the case of a private company, two members and in the case of any other company, five members personally present shall be a quorum
- (c) Any member elected by the members present at a meeting may be the chairman thereof

[NOTE —A substantive section will have to be added in lieu of (2)(d) in the present Act in accordance with the decision of the Committee about voting rights]

(3) If for any reason it is impracticable to call a meeting of a company other than an annual general meeting in any manner in which meetings of that company may be called or to conduct the meeting of the company in manner prescribed by the articles or this Act, the Court may, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting, order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit, and where any such order is given may give such ancillary or consequential directions as it thinks expedient and any meeting called, held and conducted in accordance with any such order shall for all purposes be deemed to be a meeting of the company duly called, held and conducted

3 DRAFT OF A SECTION WHICH MAY BE INCORPORATED AS SECTION 79A

(Pages 248 and 249 of the Annexure and paragraph 75 of the Report)

79A (1) Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of him, and a proxy appointed to attend and vote instead of a member of a private company shall also have the same right as a member to speak at the meeting , Prox

Provided that, unless the articles otherwise provide,

- (a) this sub-section shall not apply in the case of a company not having a share capital, and
- (b) a member of a private company shall not be entitled to appoint more than one proxy to attend on the same occasion, and
- (c) a proxy shall not be entitled to vote except on a poll

(2) In every notice calling a meeting of a company having a share capital there shall appear with reasonable prominence a statement that a member entitled to attend and vote is entitled to appoint a proxy or, where that is allowed, one or more proxies to attend and vote instead of him, and that a proxy need not also be a member, and if default is made in complying with this sub-section as respects any meeting, every officer of the company who is in default shall be liable to a fine not exceeding five hundred rupees

(3) Any provision contained in a company's articles shall be void in so far as it would have the effect of requiring the instrument appointing a proxy, or any other document necessary to show the validity of or otherwise relating to the appointment of a proxy, to be received by the company or any other person more than forty-eight hours before the meeting in order that the appointment may be effective thereat

(4) If for the purpose of any meeting of a company invitations to appoint as proxy a person or one of a number of persons specified in the invitations are issued at the company's expense to any member entitled to be sent a notice of the meeting and to vote thereat by proxy, every officer of the company who knowingly and wilfully authorises or permits their issue as aforesaid shall be liable to a fine not exceeding one thousand rupees

Provided that an officer shall not be liable under this sub-section by reason only of the issue to a member at his request in writing of a form containing the names of persons willing to act as proxy

(5) The instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorised in writing or if the appointor is a body corporate either under seal or under the hand of an Officer or an attorney duly authorised

(6) Every member entitled to attend and vote at a meeting of the company shall be entitled during the period commencing 24 hours after proxies have to be lodged under sub-section (3) hereof and ending on the conclusion of the meeting to which they relate, to inspect the proxies so lodged at any time during the business hours of the company, provided not less than three days' notice in writing of the intention to inspect is given to the company

(7) This section shall apply to meetings of any class of members of a company as it applies to general meetings of the company

4 REDRAFT OF SECTION 83.

(Pages 251 and 252 of the Annexure and paragraph 79 of the Report)

83 (1) Every company shall cause minutes of all proceedings of general meetings and of its directors to be entered in books kept for that purpose. Such minutes shall contain a fair summary of the proceedings of such meetings and, in particular, of all material questions asked or comments made thereat, and in the case of minutes of a meeting of directors the name of any director dissenting from a resolution passed at the meeting.

Minutes of proceedings of general meetings and of directors.

Provided that there shall not be required in any such minutes inclusion of any matter which, in the absolute discretion of the chairman of the meeting, could be regarded as defamatory of any person or immaterial to the proceedings or detrimental to the interests of the company.

Provided that notice of meetings of directors shall be given in writing and sent to all directors for the time being in India.

(2) Any such minutes, if purporting to be signed by the chairman of the meeting at which the proceedings were held, or by the chairman of the next succeeding meeting, shall be evidence of the proceedings.

(3) Until the contrary is proved, every general meeting of the company or the meeting of directors in respect whereof minutes have been so made shall be deemed to have been duly called and held and all proceedings had thereat to have been duly had, and all appointments of directors or liquidators shall be deemed to be valid.

(4) No report purporting to be a report of the proceedings at any meeting of a company shall be circulated or advertised at the expense of the company unless it contains the matters required by sub-section (1) hereof to be included in the minutes of the proceedings of such meeting.

(5) The books containing the minutes of proceedings of any general meeting of a company held after the commencement of the Indian Companies (Amendment) Act, 1936 (XXII of 1936), shall be kept at the registered office of the company and shall during business hours (subject to such reasonable restrictions as the company may by its articles or in general meeting impose so that not less than two hours in each day be allowed for inspection) be open to the inspection of any member without charge and for the purpose of this sub-section and sub-section (6) any document referred to in the minutes shall be deemed to form part of the minutes.

(6) Any member shall at any time after seven days from the meeting be entitled to be furnished within seven days after he has made a request in that behalf to the company with a copy of any minutes referred to in sub-section (5) at a charge not exceeding six annas for every hundred words.

(7) If any report is circulated or advertised contrary to the provisions of sub-section (4) hereof or if any inspection required under sub-section (5) hereof is refused or if any copy required under sub-section (6) hereof is not furnished within the time specified in sub-section (6), every officer of the company who is knowingly in default shall be liable in respect of each offence to a fine not exceeding five hundred rupees

(8) In the case of any such refusal or default, the court may by order compel an immediate inspection of the books in respect of all proceedings of general meetings or direct that the copies required shall be sent to the persons requiring the same.

5 REDRAFT OF SECTION 83A

(Pages 252 and 253 of the Annexure and paragraph 82 of the Report)

83A (1) Every public company, and each of its subsidiary companies (if any), shall have at least three Directors ^{Directors} ^{Obligatory} and every private company (other than a private company which is the subsidiary company of a public company) shall have at least two Directors

(2) No body corporate shall be appointed Director of a Company

6 REDRAFT OF SECTION 83B

(Pages 253 and 254 of the Annexure and paragraph 84 of the Report)

Appoint-
ment of
Directors.

83B (1) In default of and subject to any regulations in the articles of a company—

(i) the subscribers of the memorandum shall be deemed to be Directors of the company until the first Directors have been appointed,

(ii) the Directors of the company shall be appointed by the members in General Meeting

(2) Notwithstanding anything contained in the articles of a Company—

(i) any casual vacancy occurring among the Directors may be filled up by the Directors at a Board Meeting but the person so appointed shall hold office only until the next following ordinary general meeting and shall then be eligible for re-election but shall not be taken into account in determining the directors who are to retire by rotation at such meeting,

(ii) not less than two-thirds of the whole number of Directors shall be persons whose period of office is liable to determination at any time by retirement of Directors in rotation,

(iii) none of the following persons shall be appointed as a Director of a Company managed by a managing agent whose period of office is liable to determination by rotation unless he is so appointed by a resolution of the Company in General Meeting approved by a majority of not less than eighty per cent of such members as, being present in person or by proxy and being entitled so to do, vote on such resolution —

(a) A person who under any agreement whether entered into with the Managing Agent of the company or otherwise, is entitled to any share of the remuneration received by the Managing Agent from the Company,

(b) a person who is a partner of the Managing Agent of the Company,

(c) a person who is an Officer or servant of the Managing Agent of the Company;

(d) a person who is a member of the Managing Agent where such Managing Agent is a private company,

- (e) a person who employs or is in the employment of an officer or servant of the Managing Agent of the Company,
- (f) any person who is an employee of the company or of any subsidiary company of such company or of any other company under the management of the Managing Agent,
- (g) a person who holds any office or place of profit under the Company or who is a partner, officer or member of any firm or private Company or an officer of any Company which holds any office or place of profit under the Company

Special notice shall be required of any resolution appointing or approving the appointment of a Director for it to have effect for the purpose of clause (iii) of this sub-section and the notice thereof given to the company and by the company to its members must state the reasons under which such resolution is required

This sub-section shall not apply to a private company except a private company which is the subsidiary company of a public company

(3) At a General Meeting of a Company a motion for the appointment of two or more persons as Directors of the Company by a single resolution shall not be made, unless a resolution that it shall be so made has first been agreed to by the Meeting without any vote being given against it

(4) A resolution moved in contravention of sub-section (3) shall be void, whether or not its being so moved was objected to at the time, provided that where a resolution so moved is passed, no provision for the automatic re-appointment of retiring Directors in default of another appointment shall apply

(5) For the purpose of this section, a motion for approving a person's appointment or for nominating a person for appointment shall be treated as a motion for his appointment

(6) Nothing in sub-sections (3) (4) or (5) of this section shall apply to a resolution altering the company's articles

7 REDRAFT OF SECTION 85

(Pages 255 and 256 of the Annexure and paragraph 86 of the Report)

Qualification
of Directors

85 (1) Without prejudice to the restrictions imposed by section 84, it shall be the duty of every Director who is by the articles required to hold a specified share qualification and who is not already qualified to obtain his qualification within two months after his appointment. Such qualification shares shall not exceed the nominal value of Rs 5,000. Any provision in the articles of association which provides that a person shall hold the qualification shares prior to his appointment as a director shall be void.

(2) A person other than a person appointed as a technical director of a company or a director nominated by Government or a State Government shall not be deemed to have qualified himself as a director for the purposes of this section unless the qualification shares held by him are—

(i) shares to which he is solely beneficially entitled, or

(ii) shares of which he is, under a duly constituted trust, the trustee for some third person not being the managing agent of the company nor an associate of such managing agent, or

(iii) shares of which he is the nominee holder on behalf of some other company not being the managing agent of the company nor an associate of such managing agent and the remuneration received by him as director is paid by him to such other company. Provided always that in the case of a person appointed as a director before the commencement of this Act, the period within which qualification shares as herein defined are to be obtained shall be computed from the commencement of this Act.

(3) Every director, other than a technical director or a director nominated by Government or a State Government, who is required to hold a share qualification shall within two months after his appointment file with the company a declaration specifying the manner in which his qualification shares are held by him.

(4) If after the expiration of the said period, any unqualified person acts as a director of the company, he shall be liable to a fine not exceeding one thousand rupees.

(5) Nothing herein contained shall apply to a private limited company unless the private limited company is a subsidiary of a public company.

8 DRAFT OF A SECTION WHICH MAY BE INCORPORATED AS SECTION 85A

(Page 256 of the Annexure and paragraph 91 of the Report)

85A (1) No person shall after the commencement of this Act be appointed or continue to act as a Director of more than twenty companies. In calculating the number of companies of which a person is a director for the purpose of this section the following shall be excluded—

Restriction
on number of
Director
ships to be
held by a
person

- (a) directorships of private companies other than a private company which is the subsidiary company of a public company,
- (b) directorships of unlimited companies and associations not for profit, and
- (c) alternate directorships

(2) Any person who knowingly permits himself to be appointed a director of more than twenty companies or continues, after the commencement of this Act, to act as a director of more than twenty companies in contravention of sub-section (1) shall be punishable with a fine which may extend to five thousand rupees

9 REDRAFT OF SECTION 86B

(Pages 257 and 258 of the Annexure and paragraph 95 of the Report)

Assignment of office by Directors

86B Notwithstanding anything to the contrary contained in the articles of a company or in any agreement entered into between any person and the company any assignment of his office after the commencement of this Act by a director or manager of a company shall be void and of no effect

Provided that the exercise by the directors of a company of the power to appoint an alternate or substitute to act for a director (in this Section called "the original director") during his absence of not less than three months from the district in which meetings of the directors are ordinarily held, shall not be deemed to be an assignment of office within the meaning of this section

Provided always that such alternate or substitute director shall notwithstanding any provision to the contrary contained in the articles of the company—(i) "*ipso facto*" vacate office if and when the original director returns to the district in which meetings of the directors are ordinarily held and (ii) not be eligible for re-appointment as a retiring director of the company if the original director's period of office is determined before so returning

10 DRAFT OF A SECTION WHICH MAY BE INCORPORATED AS SECTION 86CC

(Page 258 of the Annexure and paragraph 101 of the Report)

86CC (1) Subject to the provisions of section 86H of this Act and of the schedule hereto where the company has a managing agent, the directors of a company shall be entitled to exercise all such powers and do all such acts and things as the company is, by its memorandum of association or otherwise, authorised to exercise and do and which are not by this Act or under or by virtue of the company's memorandum or articles directed or required to be exercised or done by the company in general meeting, but subject nevertheless to the provisions of this Act and of the company's articles or any regulations duly made thereunder

General powers of Board of Directors *vis à vis* managing agents and committees of directors

(2) Notwithstanding anything to the contrary contained in the articles of a company or otherwise it shall not be lawful for the managing agent of a company to exercise any of the following powers on behalf of the company—

- (i) the power to issue debentures ,
- (ii) the power to make calls on shareholders in respect of monies unpaid on shares in the company ,
- (iii) the power to borrow monies save within limits previously fixed by the directors at a Board Meeting ,
- (iv) the power to invest the funds of the company . and
- (v) the power to make loans save within limits previously fixed by the directors at a board meeting

Note —The powers to be exercised under sub clause (i) to (v) of clause (2) should be exercised by a board resolution passed at a meeting of the board and not by means of circulars. The relevant resolution of the board under sub clause (iv) should specify the nature of the investment to be made and the limits thereof and the relevant resolution of the board under sub clause (v) of clause (2) should specify the limits of the loans to be made and the purpose thereof

(3) Notwithstanding anything to the contrary contained in the articles of association of a company or otherwise no committee of directors, manager or managing director shall be authorised to exercise any power on behalf of the company which could not by the provisions of this Act and the Schedule hereto be exercised by a managing agent of such company

11 REDRAFT OF SECTION 86D

(Page 259 of the Annexure and paragraph 106 of the Report)

Loans to
Directors

86D (1) No company (in this section referred to as the lending company) shall make any loan or enter into any guarantee or provide any security in connection with a loan made by a third party to any of the undermentioned that is to say—

- (i) any director of the lending company, or
- (ii) any firm of which any director of the lending company is a member, or
- (iii) any private company of which any director of the lending company is a director or member, or
- (iv) any public company the managing agent, manager or directors of which are accustomed to act in accordance with the directions or instructions of any director of the lending company

Provided that nothing herein contained shall apply to the making of a loan or granting of any guarantee or providing any security by a company which is a private company (other than a subsidiary company of a public company) or by a banking company or by any holding company to its subsidiary company

(2) In the event of any contravention of sub-section (1) every person who is a party to such contravention including in particular any person to whom a loan is made or on whose behalf a guarantee is given or security provided shall be punishable with a fine which may extend to Rs 5,000 or simple imprisonment for six months in lieu of fine and shall be liable jointly and severally to the lending company for the repayment of such loan or for making good any sum which the lending company may be called upon to pay under the guarantee given or security provided by the lending company

Provided that no fine or imprisonment shall be imposed where the amount lent under the guarantee given or the security provided has been repaid and where such amount has been only partially repaid, the period of imprisonment will be proportionately reduced

Provided always that no director or officer of the lending company shall incur any liability under this sub-section in respect of any loan made, guarantee entered into or security provided in contravention of sub-section (1)(iv) unless at the time such loan was made, guarantee entered into or security provided by the lending company he had express notice that by so doing the provisions of sub-section (1)(iv) were being contravened

Note—Regarding existing loans and guarantees, see recommendation at pages 285 and 286 of the Annexure

12 REDRAFT OF SUB-SECTION (e) OF SECTION 87B

(Page 272 of the Annexure and paragraph 124 of the Report)

87B(e). Notwithstanding anything to the contrary contained in any articles of association of a company or any agreement with the managing agent in the event of termination of a managing agency agreement, the following shall apply for assessing compensation

- (a) if he resigns, otherwise than on reconstruction of the company or on amalgamation of the company and is not appointed managing agent or officer of the amalgamated or reconstructed company, or
- (b) if such termination is in pursuance of the provisions of section 87B(a) (i.e. for fraud or breach of trust or gross negligence or gross mismanagement or is due to any offence for which he can be removed), or
- (c) if he is a party to a resolution terminating or procuring the termination of the managing agency agreement either directly or otherwise, or
- (d) if the termination of the managing agency is due to the winding up of a company on account of the negligence or default of the managing agent,

no compensation shall be payable

In all other cases compensation representing the commission which the managing agent would have earned had he continued in office for the unexpired residue of the period of the managing agency agreement or for five years whichever is shorter shall be paid on the basis of the average remuneration for the last preceding five years or on the average of the period of office actually held if the period is less than five years

Provided that in the case of winding up, no compensation shall be payable if the assets on winding up are not sufficient to repay the shareholders' capital including premium, if any

Provided always that in the event of a managing agent being wrongfully dismissed and it being so held by a Court, nothing herein contained shall prejudice the managing agent's rights to claim from the company damages for wrongful dismissal

Any provision to the contrary providing for the payment of compensation except as aforesaid shall be void

The provisions herein contained will also apply to the termination of service and/or resignation of office by a managing director or a manager.

13 REDRAFT OF SECTION 87C

(Pages 278—80 of the Annexure and paragraphs 125—130 and 132 and 133 of the Report)

Remunera-
tion of
Managing
Agent

87C (1) Save as otherwise provided no managing agent shall, in respect of any financial year of a company commencing after the commencement of this Act, receive or be paid as or by way of remuneration whether in respect of his services as managing agent or otherwise any sum in excess of $12\frac{1}{2}$ per cent of the net annual profits of the company unless additional remuneration shall have previously been sanctioned by a special resolution of the company and approved by the Central Authority as being in the public interest. Provided always that a company shall be entitled in the event of absence of or inadequacy of profits to pay to its managing agent such annual sum, not exceeding rupees fifty thousand, as and by way of minimum remuneration as shall be considered reasonable by the company and the minimum remuneration sanctioned by the company at its first or any subsequent annual general meeting after this Act has come into force shall be deemed to be reasonable for the purposes of this section.

(2) For the purposes of this section "net profits" mean the profits of the company calculated after deducting—

- (a) working charges including directors' remuneration and any bonus or commission paid to any member of the staff, engineers and others and taxes of the nature of Excess Profits Tax or Business Profits Tax,
- (b) interest on loans and advances,
- (c) interest on debentures and other fixed loans,
- (d) repairs and outgoings,
- (e) depreciation,
- (f) losses of the previous years and the amount of depreciation, if any, which might not have been taken into consideration in arriving at the net profits of the earlier years, and
- (g) gratuity payable under a legal or contractual obligation.

In arriving at the amount of net profits the following shall not be deducted—

- (i) managing agents' commission,
- (ii) income-tax and super-tax on the company's profits,
- (iii) gratuity other than that mentioned under item (g) above.

In determining the amount of 'net profits' the following shall not be taken into account—

- (a) profits by way of premium on shares sold,
- (b) profits on sale proceeds of forfeited shares, and
- (c) profits from sale of whole or part of the undertaking of the company, but the amounts of bounties or subsidies, if any, receivable from

Government or public body shall be taken into account unless Government have passed orders to the contrary

The amount of depreciation to be deducted as stated above shall be the amount of normal depreciation allowable under the Income Tax Act and special, initial or other allowance or arrears of depreciation shall not be taken into account, provided however that the written down value of every asset for the purposes of this section shall be calculated after deducting such normal depreciation only. The amount of depreciation shall be calculated as per the following illustration —

Illustration — If the cost of an asset is Rs 100 and the amount of normal depreciation is 10 per cent the amount of normal depreciation shall be worked out on written down value basis as under —

First year normal depreciation due on	100
Amount	10
Written down value	90
Second year's depreciation at 10%	9
Written down value	81
Third year's depreciation at 10%	8.1
Written down value	72.9

(Note Payments out of profits under a scheme of profit sharing arrangement by a company to another company under the same management shall be deducted in computing the net profit of the paying company and the amount in the case of the receiving company shall be included in computing the net profit)

(3) The remuneration payable to the managing agent shall not become due or payable to him until the accounts of the company have been audited and laid before the company in general meeting

Provided however that a company shall be entitled to pay its managing agent minimum remuneration in suitable instalments as provided by the agreement

(4) This section shall apply to every company which has a managing agent on the date of the commencement of the Act as soon as two years have elapsed from the date of the commencement of the Act except that where a managing agent elects to bring the terms of his appointment in line with the provisions of the Act, within one year of the commencement of the Act, the basis of remuneration shall apply from the date on which the terms of appointment of the managing agent are brought in line with the Act

(5) Nothing in this section shall apply to a private company which is not a subsidiary company of a public company

Note — Although no office allowance shall be admissible to a managing agent under the provisions of the redraft of section 87C of the Act, he should be entitled to be reimbursed for all expenses incurred by him on behalf of the managed companies and sanctioned by their directors

14 DRAFT OF A SECTION WHICH MAY BE INCORPORATED AS SECTION 87CC

(Pages 281 and 282 of the Annexure and paragraph 134 of the Report)

General
powers of
managing
agents

87CC (1) Every managing agent of a company, whether appointed before or after the commencement of this Act, shall at all times and notwithstanding any provisions to the contrary contained in any agreement or otherwise be subject to the control and direction of the directors of the company except to such extent as is otherwise provided in the —Schedule to this Act

(2) No contract entered into, debt incurred or security given by a managing agent on behalf of the company which is within the ostensible authority of the managing agent to enter into, incur or give shall be invalid or ineffectual except in case of express notice to the party entering into such contract, making such loan or receiving such security at the time when the contract was entered into, debt incurred or security given that the managing agent had no authority so to contract, lend or give security on behalf of the company

**SCHEDULE—TO BE RELATED TO THE NEW SECTION
WHICH MAY BE INCORPORATED AS SECTION 87CC**

POWERS EXERCISABLE BY A MANAGING AGENT

1 The general management of the company's affairs, business transactions, property and effects shall be entrusted to the managing agent. Except to such extent as is hereafter provided in this Schedule the managing agent shall be under the control and direction of the directors of the company.

2 The managing agent shall maintain the books, papers and accounts of the company and shall have the power to engage and dismiss Managers, Assistants and all other officers and staff and all workmen and for the purposes of the company to purchase and obtain all necessary machinery, stores, goods and materials of any kind whatsoever and to sell such goods, machinery, stores, materials and/or any of the articles manufactured or acquired by the company. The managing agent shall also have power to institute, conduct, defend, compound or abandon any legal proceedings by or against the company or its officers or otherwise concerning the affairs of the company and also to compound and extend the time for payment or satisfaction of any debts due and of any claims or demands by or against the company and to refer any claims or demands by or against the company to arbitration and to observe and perform the awards, and also to act on behalf of the company in all matters relating to bankrupts or insolvents.

3 The managing agent shall have power to make, draw, endorse, sign, accept, negotiate and give all cheques, bills of lading, drafts, orders, bills of exchange, Government of India and other promissory notes and other negotiable instruments required in connection with the business of the company and may also sign and give all receipts, releases and other discharges for money payable to the company and for the claims and demands of the company and may exercise such of the powers of the directors as may from time to time be lawfully delegated to him.

4 Notwithstanding anything contained in clauses 2 and 3 of this Schedule the managing agent shall only exercise the following powers with the previous specific approval of the directors of the company that is to say —

- (a) The power to appoint any person as manager of the company within the meaning of the Act
- (b) The power to engage on behalf of the company any person who is a relation of any director or of any partner of the managing agent or of any director of the Company
- (c) The power to compound or sanction the extension of time for payment of or satisfaction of any debt due to the company from any associate of such managing agent
- (d) The power to engage staff on behalf of the company except staff whose remuneration is within limits prescribed by the directors of the company
- (e) The power to purchase or sell capital assets on behalf of the company except where the purchase or sale price is within limits prescribed by the directors of the company

5 Notwithstanding any of the provisions hereinbefore contained in this Schedule, the directors of a company may at any time or times during the continuance of the agreement with its managing Agent by resolution provide that any or all of the powers conferred on the managing agent under clauses 2 and 3 hereof shall only be exercisable by the managing agent under the control and direction of the directors and may likewise revoke or modify such resolution or resolutions

6 Save as what is contained in this Schedule the managing agent shall not without previous consent of the directors obtained at a meeting exercise any other powers on behalf of the company

15 REDRAFT OF SECTION 87D

(Page 282 of the Annexure and paragraphs 136 and 137 of the Report)

87D (1) No company (in this section referred to as the lending company) shall make any loan or enter into any guarantee or provide any security in connection with the loan made by a third party to any of the undermentioned that is to say—

- (i) the managing agent of the lending company, or
- (ii) any firm of which the managing agent of the lending company is a partner, or
- (iii) any partner of the managing agent of the lending company, or
- (iv) any private company of which the managing agent of the lending company or any partner of the managing agent or, where the managing agent is a private company, any officer of the managing agent is a member, director, managing agent or manager, or
- (v) where the managing agent of the lending company is a body corporate, any subsidiary company of the managing agent and any director, managing agent or manager of such managing agent or of any subsidiary company of the managing agent, or
- (vi) where the managing agent of the lending company is a private company, any member or director thereof

(2) Notwithstanding anything contained in Section 86D, nothing contained in this section shall apply to any credit held by the managing agent in a current account maintained, subject to limits previously approved by the board of directors and on no account exceeding Rs 20,000, by the company with the managing agent for the purposes of the company's business

(3) In the event of any contravention of sub-section (1) every person who is a party to such contravention including in particular any person to whom a loan is made or on whose behalf a guarantee is given or security provided shall be punishable with a fine which may extend to Rs 5,000 or simple imprisonment for six months in lieu of fine and shall be liable jointly and severally to the lending company for the repayment of such loan or for making good any sum which the lending company may be called upon to pay under the guarantee given or security provided by the lending company

Provided that no fine or imprisonment shall be imposed where the amount lent under the guarantee given or the security provided has been repaid and where such amount has been only partially repaid, the period of imprisonment will be proportionately reduced

(4) Nothing in this section shall apply to a private company except a private company which is the subsidiary company of a public company

Note—Regarding existing loans, guarantees and current accounts, see recommendation at pages 285 and 286 of the Annexure

16 REDRAFT OF SECTION 87E

(Pages 285—87 of the Annexure and paragraph 138 of the Report)

Loans to or
by com-
panies under
the same
management

87E (1) No company (in this section referred to as the lending company) shall make any loan or enter into any guarantee or provide any security in connection with a loan made by a third party to any company that is under the same management as the lending company unless such loan, guarantee or security shall previously have been sanctioned by a special resolution of the lending company

Explanation—For the purposes of this section the lending company shall be deemed to be under the same management as that of the other company if—

- (i) any person occupies in respect of both the said companies one or other of the positions, namely, manager, managing director or managing agent or partner of the managing agency firm or member or director of the managing agency company where the managing agent is a private company, or
- (ii) the majority of the directors of both the said companies are common to each company

(2) Nothing contained in sub-section (1) shall apply to the making of any loan by a holding company to its subsidiary or by any managing agent to any company under his management or to the giving of any guarantee or security by a holding company or managing agent in respect of any loan granted to such subsidiary or company under the management of the managing agent, as the case may be

(3) In the event of any contravention of sub-section (1) every person who is a party to such contravention including in particular any person to whom a loan is made or on whose behalf a guarantee is given or security provided shall be punishable with a fine which may extend to Rs 5,000 or simple imprisonment for six months in lieu of fine and shall be liable jointly and severally to the lending company for the repayment of such loan or for making good any sum which the lending company may be called upon to pay under the guarantee given or security provided by the lending company

Provided that no fine or imprisonment shall be imposed where the amount lent under the guarantee given or the security provided has been repaid and where such amount has been only partially repaid, the period of imprisonment will be proportionately reduced

Note—Regarding existing loans and guarantees, see recommendation at pages 285 and 286 of the Report

17 REDRAFT OF SECTION 87H

(Page 289 of the Annexure and paragraph 140 of the Report)

87H (1) A managing agent shall not after the date of his appointment or reappointment on his own account engage in any business which is of the same nature as and directly competes with the business carried on by a company of which he is the managing agent or by a subsidiary company of such company

Managing Agent not to engage in business competing with the business of managed company.

(2) For the purposes of sub-section (1) a managing agent shall be deemed to be engaged in business on his own account if such business is carried on by—

- (i) a partnership firm of which he is a member, or
- (ii) a public company at any general meeting of which the managing agent, either alone or together with any partner of the managing agent and (where the managing agent is a private company) any officer of the managing agent, is entitled to exercise or control the exercise of 70 per cent or more of the voting power, or
- (iii) a private company at any general meeting of which the managing agent, either alone or together with any partner of the managing agent and (where the managing agent is a company) any officer of the managing agent, is entitled to exercise or control the exercise of 20 per cent or more of the voting power

(3) Any managing agent who engages in business in contravention of the provisions of sub-section (1) shall be deemed to have received all profits or benefits accruing to him from such business in trust for the company under his management referred to in that sub-section or the subsidiary company of such company as the case may be and where such profits or benefits are so deemed to have been received by the managing agent in trust for more than one company they shall be held by him in trust for all such companies for the time being in such proportions as failing agreement between the companies entitled thereto, the Court shall decide

18. REDRAFT OF SECTION 87I

(Page 290 of the Annexure and paragraph 84 of the Report)

Power of
Managing
Agent to
appoint
Directors

87I Notwithstanding anything contained in the articles of a company or otherwise the managing agent of the company shall be at liberty to appoint up to but not more than one-third of the actual number of directors of the company for the time being and to remove from office any person so appointed and upon the removal or retirement of any such person to appoint any person in his place

19 DRAFT OF A SECTION WHICH MAY BE INCORPORATED AS SECTION 87J

(Pages 290 and 291 of the Annexure and paragraph 146 of the Report)

87J (1) No company shall—

- (a) employ any firm or body corporate as its manager, or
- (b) appoint or employ as manager or managing director any person who is the manager or managing director of any other company provided that the company, by the unanimous resolution of the directors passed at a meeting of the Board, may appoint or employ as manager or managing director any person who is the manager or managing director of one other company and not more, or
- (c) employ any person as manager who is or at any time has been adjudicated insolvent, or has suspended payment or has compounded with his creditors, or who is or has been convicted by a Criminal Court of an offence involving, moral turpitude, or
- (d) be managed by a manager who has a contract with the company for its management for a period exceeding five years at any one time, or
- (e) appoint or employ any director as a managing director for a period exceeding five years at any one time, or
- (f) appoint or employ any person firm or body corporate to or in any office or place of profit under the company for a period exceeding five years at any one time

Appointment and terms of office of manager and managing director

This shall not cover the agreement of a technician or of a consultant if such technician or consultant is not already a managing agent or a member or director of the managing agency firm or company

Provided that the said period of five years referred to in sub-clauses (d), (e) and (f) of this sub-section shall in relation to contracts subsisting on the date of the publication of the Report, be computed from that date

(2) Any contract with a company for its management by a manager or a managing director may be renewed or extended for a further period not exceeding five years at a time if and so often as the company so decides,

(3) If a company pays any commission or remuneration in the shape of commission to its managing director or manager, it shall be based on net profits, and the calculation of net profits shall be the same as is defined under section 87C

(4) The provisions of sub-section (3) hereof shall as regards contracts existing on the date of the passing of this Act apply as from the expiration of two years from the commencement of the Act

(5) This section shall not apply to a private company except a private company which is the subsidiary company of a public company

Explanation—For the purpose of this section, the office of managing agent or the place of debenture trustee shall not be deemed to be an office or place of profit under the company but the office of selling agent or buying agent by whatever name called shall be so deemed

**20. REDRAFTS OF PROSPECTUS SECTIONS 92 TO 102
WHICH MAY BE RENUMBERED AS SECTIONS 92
TO 101, 101A TO 101F AND 102**

(Pages 295—98 of the Annexure and paragraphs 53—69 of the Report)

PROSPECTUS

92 A prospectus issued by or on behalf of a company or in relation to an intended company shall be dated, and that date shall, unless the contrary is proved, be taken as the date of publication of the prospectus Dating of Prospectus.

93 (1) Every prospectus issued by or on behalf of a company, or by or on behalf of any person who is or has been engaged or interested in the formation of the company, must state the matters specified in Part I of the Schedule to this Act and set out the reports specified in Part II of that Schedule, and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule Matters to be stated and reports to be set out in prospectus

(2) A condition requiring or binding an applicant for shares in or debentures of a company to waive compliance with any requirement of this section, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void

(3) It shall not be lawful to issue any form of application for shares in or debentures of a company unless the form is issued with a prospectus which complies with the requirements of this section

Provided that this sub-section shall not apply if it is shown that the form of application was issued either—

- (a) in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures, or
- (b) in relation to shares or debentures which were not offered to the public

If any person acts in contravention of the provisions of this sub-section, he shall be liable to a fine not exceeding five thousand rupees

(4) In the event of non-compliance with or contravention of any of the requirements of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

(4) No prospectus shall be issued more than ninety days after the date of the copy delivered for registration, and if a prospectus is so issued it shall be deemed to be a prospectus a copy of which has not been delivered under this section to the Registrar

(5) If a prospectus is issued without a copy thereof being delivered under this section to the Registrar or without the copy so delivered having endorsed thereon or attached thereto the required documents, the company, and every person who is knowingly a party to the issue of the prospectus, shall be liable to a fine not exceeding five thousand rupees

Restriction
on alteration
of terms
mentioned
in prospectus
or statement
in lieu of
prospectus

96 A company shall not, at any time, vary the terms of a contract referred to in the prospectus or statement in lieu of prospectus, except subject to the approval of the company in general meeting

Civil liability
for mis
statements
in prospec-
tus

97 (1) Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement included therein, that it to say—

- (a) every person who is a director of the company at the time of the issue of the prospectus,
- (b) every person who has authorised himself to be named and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time,
- (c) every person being a promoter of the company, and
- (d) every person who has authorised the issue of the prospectus

Provided that where, under section ninety-four of this Act, the consent of a person is required to the issue of a prospectus and he has given that consent, or where, under sub-section (3)(b) to section ninety five of this Act the consent of a person named in a prospectus is required and he has given that consent, he shall not by reason of his having given it be liable under this sub section as a person who has authorised the issue of the prospectus except in respect of an untrue statement purporting to be made by him as an expert

(2) No person shall be liable under sub-section (1) of this section if he proves—

- (a) that, having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent, or
- (b) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent, or
- (c) that, after the issue of the prospectus and before allotment thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal and of the reason therefor, or

(d) that—

- (i) as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he had reasonable ground to believe, and did up to the time of the allotment of the shares or debentures, as the case may be, believe, that the statement was true, and
- (ii) as regards every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe that the person making the statement was competent to make it and that person had given the consent required by section ninety-four of this Act to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder, and
- (iii) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document

Provided that this sub-section shall not apply in the case of a person liable, by reason of his having given a consent required of him by the said section ninety-four, as a person who has authorised the issue of the prospectus, in respect of an untrue statement purporting to be made by him as an expert

(3) A person who, apart from this sub-section would under sub-section (1) of this section be liable by reason of his having given a consent required of him by section ninety-four of this Act, as a person who has authorised the issue of a prospectus in respect of an untrue statement purporting to be made by him as an expert shall not be so liable if he proves—

- (a) that, having given his consent under the said section ninety-four to the issue of the prospectus, he withdrew it in writing before delivery of a copy of the prospectus for registration, or
- (b) that, after delivery of a copy of the prospectus for registration and before allotment thereunder he, on becoming aware of the untrue statement, withdrew his consent in writing and gave reasonable public notice of the withdrawal, and of the reason therefor, or
- (c) that he was competent to make the statement and that he had reasonable ground to believe and did up to the time of allotment of the shares or debentures, as the case may be, believe that the statement was true

(4) Where—

- (a) the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus, and has not authorised or consented to the issue thereof, or
- (b) the consent of a person is required under section ninety-four of this Act to the issue of the prospectus and he either has not given that consent or has withdrawn it before the issue of the prospectus,

the directors of the company, except any without whose knowledge or consent the prospectus was issued, and any other person who authorised the issue thereof shall be liable to indemnify the person named as aforesaid or whose consent was required as aforesaid, as the case may be, against all damages, costs and expenses to which he may be made liable by reason of his name having been inserted in the prospectus or of the inclusion therein of a statement purporting to be made by him as an expert, as the case may be, or in defending himself against any action or legal proceeding brought against him in respect thereof,

Provided that a person shall not be deemed for the purposes of this sub-section to have authorised the issue of a prospectus by reason only of his having given the consent required by section ninety-four of this Act to the inclusion therein of a statement purporting to be made by him as an expert

(5) Every person who, by reason of his being a director or named as a director or as having agreed to become a director or of his having authorised the issue of the prospectus, becomes liable to make any payment under this section, may recover contribution, as in cases of contract, from any other person, who if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation

(6) For the purposes of this section—

(a) the expression “promoter” means a promoter who was a party to the preparation of the prospectus, or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company, and

(b) the expression “expert” has the same meaning as in section ninety-four of this Act

98 (1) Where a prospectus issued after the commencement of this Act includes any untrue statement, any person who authorised the issue of the prospectus shall be liable on conviction to imprisonment for a term not exceeding two years, or a fine not exceeding five thousand rupees or both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe that the statement was true

Criminal liability for misstatements in prospectus

(2) A person shall not be deemed for the purposes of this section to have authorised the issue of a prospectus by reason only of his having given the consent required by section ninety-four of this Act to the inclusion therein of a statement purporting to be made by him as an expert or the consent required by sub-section (3)(b) to section ninety-five of this Act

99 (1) Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptive, or by any dishonest concealment of material facts, or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person to enter into or offer to enter into—

Penalty for fraudulently inducing persons to invest money

- (a) any agreement for, or with a view to, acquiring, disposing of, subscribing for or underwriting shares or debentures, or
- (b) any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of shares or debentures or by reference to fluctuations in the value of shares or debentures,

shall be guilty of an offence, and liable to imprisonment for a term not exceeding five years or a fine not exceeding ten thousand rupees, or both

(2) Any person guilty of conspiracy to commit an offence under the preceding sub-section shall be punishable as if he had committed such an offence

Document
containing
offer of
shares or
debentures
for sale to
be deemed
prospectus

100 (1) Where a company allots or agrees to allot any shares in or debentures of the company with a view to all or any of those shares or debentures being offered for sale to the public, any document by which the offer for sale to the public is made shall for all purposes be deemed to be a prospectus issued by the company, and all enactments and rules of law as to the contents of prospectuses and to liability in respect of statements in and omissions from prospectuses, or otherwise relating to prospectuses, shall apply and have effect accordingly, as if the shares or debentures had been offered to the public for subscription and as if persons accepting the offer in respect of any shares or debentures, were subscribers for those shares or debentures, but without prejudice to the liability if any, of the persons by whom the offer is made, in respect of mis-statements contained in the document or otherwise in respect thereof

(2) For the purposes of this Act, it shall, unless the contrary is proved, be evidence that an allotment of, or an agreement to allot, shares or debentures was made with a view to the shares or debentures being offered for sale to the public if it is shown—

- (a) that an offer of the shares or debentures or of any of them for sale to the public was made within six months after the allotment or agreement to allot, or
- (b) that at the date when the offer was made the whole consideration to be received by the company in respect of the shares or debentures had not been so received

(3) Section ninety-three of this Act as applied by this section shall have effect as if it required a prospectus to state in addition to the matters required by that section to be stated in a prospectus—

- (a) the net amount of the consideration received or to be received by the company in respect of the shares or debentures to which the offer relates, and

- (b) the place and time at which the contract under which the said shares or debentures have been or are to be allotted may be inspected,

and section ninety-five of this Act as applied by this section shall have effect as though the persons making the offer were persons named in a prospectus as directors of a company

(4) Where a person making an offer to which this section relates is a company or a firm, it shall be sufficient if the document aforesaid is signed on behalf of the company or firm by two directors of the company or not less than half of the partners, as the case may be, and any such director or partner may sign by his agent authorised in writing

101. For the purposes of the foregoing provisions of this Part of this Act—

Interpreta-
tion of pro-
visions rela-
ting to
prospec-
tuses

- (a) a statement included in a prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included,

- (b) a statement shall be deemed to be included in a prospectus if it is contained therein or in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith, and

- (c) where the omission from a prospectus of any matter which is required to be stated therein under the provisions of section ninety-three and the Schedule to this Act is calculated to mislead, the prospectus shall be deemed, in respect of such omission, to be a prospectus in which an untrue statement is included

101A (1) No allotment shall be made of any share capital of a company offered to the public for subscription unless the amount stated in the prospectus as the minimum amount which, in the opinion of the directors must be raised by the issue of share capital in order to provide for the matters specified in clause 5 of the Schedule to this Act has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company in cash

Prohibition
of allotment
unless
minimum
subscription
received

(2) The amount so stated in the prospectus shall be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as "the minimum subscription"

(3) The amount payable on application on each share shall not be less than five per cent of the nominal amount of the share

(4) All monies received from applicants for shares shall be deposited and kept in a scheduled bank as defined in the Reserve Bank of India Act, 1934 (II of 1934), until returned in accordance with the provisions of sub-section (5) or until the certificate to commence business is obtained under Section 103 of this Act

(5) If the conditions aforesaid have not been complied with on the expiration of ninety days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to them without interest, and, if any such money is not so repaid within one hundred days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per cent per annum from the expiration of the one hundredth day

Provided that a director shall not be liable if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part

(6) Any condition requiring or binding any applicant for shares to waive compliance with any requirement of this section shall be void

(7) This section, except sub-section (3) thereof, shall not apply to any allotment of shares subsequent to the first allotment of shares offered to the public for subscription

(8) In the event of any contravention of the provisions of sub-section (4) every promotor, director or other person knowingly responsible for such contravention shall be liable to a fine not exceeding five thousand rupees

Prohibition
of allotment
in certain
cases unless
statement
in lieu of
prospectus
delivered to
Registrar

101B (1) A company having a share capital which does not issue a prospectus on or with reference to its formation, or which has issued such a prospectus but has not proceeded to allot any of the shares offered to the public for subscription, shall not allot any of its shares or debentures unless at least three days before the first allotment of either shares or debentures there has been delivered to the Registrar of Joint Stock Companies for registration a statement in lieu of prospectus signed by every person who is named herein as a director or a proposed director of the company or by his agent authorised in writing, in the form and containing the particulars set out in Part I of the Schedule to this Act and, in the cases mentioned in Part II of that Schedule, setting out the reports specified therein, and the said Parts I and II shall have effect subject to the provisions contained in Part III of that Schedule

(2) Every statement in lieu of prospectus delivered under the foregoing sub-section shall, where the persons making any such report as aforesaid have made therein or have, without giving the reasons, indicated therein any such adjustments as are mentioned in clause 34 of the said — Schedule, have endorsed thereon or attached thereto a written statement signed by those persons setting out the adjustments and giving the reasons therefor

(3) This section shall not apply to a private company

(4) If a company acts in contravention of sub-section (1) or (2) of this section, the company and every director of the company who knowingly and wilfully authorises or permits the contravention shall be liable to a fine not exceeding one thousand rupees

(5) Where a statement in lieu of prospectus delivered to the Registrar of Joint Stock Companies under sub-section (1) of this section includes any untrue statement, any person who authorises the delivery of the statement in lieu of prospectus for registration shall be liable on conviction to imprisonment for a term not exceeding two years or a fine not exceeding five thousand rupees, or both, unless he proves either that the untrue statement was immaterial or that he had reasonable ground to believe and did up to the time of the delivery for registration of the statement in lieu of prospectus believe that the untrue statement was true

(6) For the purposes of this section—

(a) a statement included in a statement in lieu of prospectus shall be deemed to be untrue if it is misleading in the form and context in which it is included,

(b) a statement shall be deemed to be included in a statement in lieu of prospectus if it is contained therein or in any report or memorandum appearing on the face thereof or by reference incorporated therein and

(c) where the omission from a statement in lieu of prospectus of any matter which is required to be stated therein under the provisions of the Schedule to this Act is calculated to mislead, the statement in lieu of prospectus shall be deemed in respect of such omission to be a statement in lieu of prospectus in which an untrue statement is included

101C (1) An allotment made by a company to an applicant in contravention of the provisions of section 101A or section 101B shall be voidable at the instance of the applicant within two months after the holding of the statutory meeting of the company and not later or in any case where the company is not required to hold a statutory meeting or where the allotment is made after the holding of the statutory meeting within two months after the date of the allotment and not later, and shall be so voidable notwithstanding that the company is in course of being wound up

Effect of
irregular
allotment

(2) If any director of a company knowingly contravenes or permits or authorises the contravention of any of the provisions of section 101A or section 101B with respect to allotment, he shall be liable to compensate the company and the allottee respectively for any loss, damages or costs which the company or the allottee may have sustained or incurred thereby. Provided that proceedings to recover any such loss, damages or costs shall not commence after the expiration of two years from the date of the allotment.

Application
for and
allotment
of, shares
and deben-
tures.

101D (1) No allotment shall be made of any shares in or debentures of a company in pursuance of a prospectus issued generally and no proceedings shall be taken on applications made in pursuance of a prospectus so issued, until the beginning of the fifth day after that on which the prospectus is first so issued or such later time (if any) as may be specified in the prospectus.

Provided always that where, after a prospectus is first issued generally, a public notice is given by some person responsible under section ninety-seven of this Act for the prospectus and having the effect of excluding or limiting the responsibility of the person giving it then and in that case and without limiting or diminishing any liability that might be incurred under the general law or this Act no allotment shall be made before the beginning of the fifth day after that on which such public notice is first given.

The beginning of the said fifth day or such later time as aforesaid is hereafter in this Act referred to as "the time of the opening of the subscription lists"

(2) In the foregoing sub-section, the reference to the day on which the prospectus is first issued generally shall be construed as referring to the day on which it is first so issued as a newspaper advertisement.

Provided that, if it is not so issued as a newspaper advertisement before the fifth day after that on which it is first so issued in any other manner, the said reference shall be construed as referring to the day on which it is first so issued in any manner.

(3) The validity of an allotment shall not be effected by any contravention of the foregoing provisions of this section but, in the event of any such contravention, the company and every officer of the company who is in default shall be liable to a fine not exceeding five thousand rupees.

(4) In the application of this section to a prospectus offering shares or debentures for sale, the foregoing sub-sections shall have effect with the substitution of references to sale for references to allotment, and with the substitution for the reference to the company and every officer of the company who is in default of a reference to any person by or through whom the offer is made and who knowingly and wilfully authorises or permits the contravention.

(5) An application for shares in or debentures of a company which is made in pursuance of a prospectus issued generally shall not be revocable until after the expiration of the fifth day after the time of the opening of the subscription lists, or the giving before the expiration of the said fifth day, by some person responsible under section ninety seven of this Act for the prospectus of a public notice having the effect under that section of excluding or limiting the responsibility of the person giving it

(6) In reckoning for the purposes of this and the next succeeding section the fifth or, as the case may be, the tenth day after another day, any intervening day which is a public holiday under the Negotiable Instruments Act, 1881, shall be disregarded, and if the fifth or the tenth day (as so reckoned) is itself a public holiday there shall for the said purposes be substituted the first day thereafter which is not

(7) Where a prospectus is issued generally the company shall announce the day on which the subscription list is closed and the allotment of shares or debentures shall be made and notices of such allotment issued not later than the tenth day after such day

101E (1) Where a prospectus, whether issued generally or not, states that application has been or will be made for permission for the shares or debentures offered thereby to be dealt in on any stock exchange, any allotment made on an application in pursuance of the prospectus shall, whenever made, be void if the permission has not been applied for before the tenth day after the first issue of the prospectus or if the permission has been refused before the expiration of three weeks from the date of the closing of the subscription lists or such longer period not exceeding six weeks as may, within the said three weeks, be notified to the applicant for permission by or on behalf of the stock exchange

Allotment
of shares
and debentures to be
dealt in on
stock
exchange

(2) Where the permission has not been applied for as aforesaid, or has been refused as aforesaid, the company shall forthwith repay without interest all money received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per cent per annum from the expiration of the eighth day

Provided that a director shall not be liable if he proves that the default in the repayment of the money was not due to any misconduct or negligence on his part

(3) All money received as aforesaid shall be kept in a separate bank account maintained with a scheduled bank as defined by the Reserve Bank Act so long as the company may become liable to repay it under the last foregoing sub-section, and if default is made in complying with this sub-section the company and every officer of the company

who is in default shall be liable to a fine not exceeding five thousand rupees

(4) Any condition requiring or binding any applicant for shares or debentures to waive compliance with any requirement of this section shall be void

(5) For the purpose of this section, permission shall not be deemed to be refused if it is intimated that the application for it, though not at present granted, will be given further consideration

(6) This section shall have effect—

(a) in relation to any shares or debentures agreed to be taken by a person underwriting an offer thereof by a prospectus as if he had applied therefor in pursuance of the prospectus, and

(b) in relation to a prospectus offering shares for sale with the following modifications, that is to say—

(i) reference to sale shall be substituted for reference to allotment,

(ii) the persons by whom the offer is made and not the company, shall be liable under sub-section (2) to repay money received from applicants, and references to the company's liability under that sub-section shall be construed accordingly, and

(iii) for the reference in sub-section (3) to the company and every officer of the company who is in default there shall be substituted a reference to any person by or through whom the offer is made and who knowingly and wilfully authorises or permits the default

(7) The Central Government may, from time to time by notification in the Official Gazette, prescribe what stock exchanges shall be recognised as such for the purposes of this section and application for permission for shares or debentures to be dealt in on any stock exchanges not so recognised or the granting of such permission by a stock exchange not so recognised shall not be deemed to be compliance with the provisions of this section

Advertisements of prospectus.

101F Where any prospectus is published as a newspaper advertisement, it shall not be necessary in the advertisement to specify the contents of the memorandum or the signatories thereto, and the number of shares subscribed for by them

102 (1) It shall not be lawful for any person to go from house to house offering shares or debentures for subscription or purchase to the public or any member of the public

In this sub-section—

- (a) the expression "house" shall not include an office used for business purposes, and
- (b) the expression "offering" includes an invitation to make an offer

(2) Any person acting in contravention of this section shall be liable to a fine not exceeding rupees

Explanation—For the purposes of this section shares or debentures shall include shares or debentures of any company whether a company within the meaning of this Act or not

SCHEDULE

(See redraft of sections 92 to 102 of the Indian Companies Act)

**MATTERS TO BE SPECIFIED IN PROSPECTUS AND
REPORTS TO BE SET OUT THEREIN**

Part I—Matters to be specified

1 The contents of the memorandum, with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively, and the number of founders or management or deferred shares (if any) and the nature and extent of the interest of the holders in the property and profits of the company and the number of redeemable preference shares intended to be issued with the date or, where no date is fixed, the period of notice required and the proposed method of redemption

2 The number of shares (if any) fixed by the articles as the qualification of a director, and any provision in the articles as to the remuneration of the directors whether for their services to the company as directors, managing directors or otherwise

3 The names, descriptions and addresses of the directors or proposed directors and of the managers or proposed managers and managing directors or proposed managing directors and managing agents or proposed managing agents (if any) and any provision in the articles or in any contract as to the appointment of managers, managing directors or managing agents, the remuneration payable to them and the compensation (if any) payable to them for loss of office

4 In the case of a company managed by a managing agent, the subscribed capital of the managing agency company

5 Where shares are offered to the public for subscription, particulars as to—

(a) the minimum amount which, in the opinion of the directors arrived at after due enquiry, must be raised by the issue of those shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums, required to be provided in respect of each of the following matters and distinguishing the amount required under each head —

(1) the purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue,

- (ii) any preliminary expenses payable by the company, and any commission so payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares in the company,
- (iii) the repayment of any money borrowed by the company in respect of any of the foregoing matters,
- (iv) working capital,
- (v) any other expenditure stating the nature and purpose thereof and the estimated amount in each case, and
- (b)* the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue and the sources out of which those amounts are to be provided

6 The time of the opening of the subscription lists

7 The amount payable on application and allotment on each share and in the case of a second or subsequent offer of shares the amount offered for subscription on each previous allotment made within the two preceding years, the amount actually allotted and the amount, if any paid on the shares so allotted

8 The substance of any contract or arrangement or proposed contract or arrangement whereby any option or preferential right of any kind has been or is proposed to be given to any person to subscribe for any shares in or debentures of a company, giving the number description and amount of any such shares or debentures and including the following particulars of the option or right —

- (a) the period during which it is exerciseable,
- (b) the price to be paid for shares or debentures subscribed for under it,
- (c) the consideration (if any) given or to be given for it or for the right to it
- (d) the names and addresses of the persons to whom it or the right to it was given or if given to existing shareholders or debenture holders as such, the relevant shares or debentures,
- (e) any other material fact or circumstance relevant to the grant of such option or right

Subscribing for shares or debentures shall for the purpose of this clause, include acquiring them from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale

9 The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are so paid up, and in either case the consideration for which those shares or debentures have been issued or agreed to be issued

10 The amount payable by way of premium (if any) on each share which has been or is to be issued stating the dates of issue and, where some shares have been or are to be issued at a premium and other shares of the same class at par or at a lower premium the reasons for the differentiation and how any premium has been or is to be disposed of

11 Where any issue of shares or debentures is under-written, the names of the under-writers, and the opinion of the directors that the resources of the under-writers are sufficient to discharge the under-writing obligations

12 (1) As respects any property to which this clause applies—

(a) the names and addresses of the vendors,

(b) the amount paid or payable in cash, shares or debentures to the vendor and, where there is more than one separate vendor, or the company is a sub-purchaser, the amount so payable to each vendor specifying the amount, if any, payable for goodwill,

(c) the nature of the title or interest in such property acquired or to be acquired by the company,

(d) short particulars of any transaction relating to the property completed within the two preceding years in which any vendor of the property to the company or any person who is, or was at the time of the transaction, a promoter or a director or proposed director of the company had any interest direct or indirect and giving the dates of any such transactions and the names of any such promoter or director and stating the amount payable by or to such vendor, promoter or director in respect of any such transaction

(2) The property to which this clause applies is property purchased or acquired by the company or proposed so to be purchased or acquired, which is to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus or the purchase or acquisition of which has not been completed at the date of the issue of the prospectus other than property—

(a) the contract for the purchase or acquisition whereof was entered into in the ordinary course of the company's business the contract not being made in contemplation of the issue nor the issue in consequence of the contract, or

- (b) as respects which the amount of the purchase money is not material

13 The amount, if any, or the nature and extent of any consideration, paid within the two preceding years, or payable, as commission to any person (including commission so paid or payable to any sub-underwriter, who is a promoter or officer of the company) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions for any shares in, or debentures of the company, the name, occupation and address of each such person, particulars of the amounts which each has under-written or sub-underwritten, of the rate of the commission payable for such under-writing or sub-under-writing, and any other material term or condition of the under-writing or sub-under-writing contract with such person, and when such person is a company or a firm, the nature of any interest direct or indirect, in such company or firm of any promoter or officer of the company in respect of which the prospectus is issued

14 The amount or estimated amount of preliminary expenses and the persons by whom any of those expenses have been paid or are payable, and the amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses have been paid or are payable

15 Any amount or benefit paid or given within the two preceding years or intended to be paid or given to any promoter and the consideration for the payment or the giving of the benefit

16 The dates of, parties to and general nature of every material contract, not being a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company or a contract (other than a contract appointing or fixing the remuneration of a managing director, managing agent or manager) entered into more than two years before the date of issue of the prospectus, and a reasonable time and place at which any such material contract or a copy thereof may be inspected

17 The names and addresses of the auditors (if any) of the company

18 Full particulars of the nature and extent of the interest (if any) of every director or promoter in the promotion of, or in the property acquired within two years of the date of the prospectus or proposed to be acquired by, the Company, or where the interest of such a director or promoter consists in being a member of a firm or company the nature and extent of the interest of the firm or company, with a statement of all sums paid or agreed to be paid to him or to the firm or company in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by the firm or company in connection with the promotion or formation of the company

19 Where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by, and the rights in respect of capital and dividends attached to, the several classes of shares respectively

20 Where the articles of the company impose any restrictions upon the members of the company in respect of the right to attend, speak or vote at meetings of the company or of the right to transfer shares, or upon the directors of the company in respect of their powers of management, the nature and extent of these restrictions

21 In the case of a company which has been carrying on business, or of a business which has been carried on for less than three years the length of time during which the business of the company or the business to be acquired, as the case may be, has been carried on

22 Particulars of the capitalisation of any reserves or profits of the company or any of its subsidiaries and particulars of the surplus arising from the revaluation of the assets of the company or any of its subsidiaries during two years preceding the date of the prospectus and the manner in which such surplus has been dealt with

23 A reasonable time and place at which copies of all balance sheets and profit and loss account, if any, on which the report of the auditors under Part II hereof is based may be inspected

Part II—Reports to be set out

24 (1) A report by the auditors of the company with respect to—

(a) profits and losses and assets and liabilities in accordance with sub-clause (2) or (3) of this clause, as the case requires, and

(b) the rates of the dividends if any, paid by the company in respect of each class of shares in the company in respect of each of the five financial years immediately preceding the issue of the prospectus, giving particulars of each such class of shares on which such dividends have been paid and particulars of the cases in which no dividends have been paid in respect of any class of shares in respect of any of those years,

and, if no accounts have been made up in respect of any part of the period of five years ending on a date three months before the issue of the prospectus, containing a statement of that fact

(2) If the company has no subsidiaries, the report shall—

(a) so far as regards profits and losses, deal with the profits or losses of the company distinguishing items of a non-recurring nature in respect of each of the five financial years immediately preceding the issue of the prospectus, and

- (b) so far as regards assets and liabilities, deal with the assets and liabilities of the company at the last date to which the accounts of the company were made up

(3) If the company has subsidiaries, the report shall—

- (a) so far as regards profits and losses, deal separately with the company's profits or losses as provided by the last foregoing sub-clause and in addition, deal either—

- (i) as a whole with the combined profits or losses of its subsidiaries, so far as they concern members of the company, or

- (ii) individually with the profits or losses of each subsidiary, so far as they concern members of the company,

or, instead of dealing separately with the company's profits or losses, deal as a whole with the profits or losses of the company, and, so far as they concern members of the company, with the combined profits or losses of its subsidiaries, and

- (b) so far as regards assets and liabilities, deal separately with the company's assets and liabilities as provided by the last foregoing sub-clause and, in addition, deal either—

- (i) as a whole with the combined assets and liabilities of its subsidiaries, with or without the companies assets and liabilities, or

- (ii) individually with the assets and liabilities of each subsidiary,

and shall indicate as respects the assets and liabilities of the subsidiaries the allowance to be made for persons other than members of the company

25 If the proceeds, or any part of the proceeds of the issue of the shares or debentures are or is to be applied directly or indirectly—

- (i) in the purchase of any business, or

- (ii) in the purchase of an interest in any business and by reason of that purchase or anything to be done in consequence thereof or in connection therewith the company will become entitled to an interest, as respects either the capital or profits and losses, or both in such business exceeding fifty per cent thereof

a report made by accountants (who shall be named in the prospectus) upon—

- (a) the profits or losses of the business in respect of each of the five financial years immediately preceding the issue of the prospectus, and

- (b) the assets and liabilities of the business at the last date to which the accounts of the business were made up being a date not more than one hundred and twenty days before the date of the issue of the prospectus

26 (1) If—

- (a) the proceeds, or any part of the proceeds, of the issue of the shares or debentures are or is to be applied directly or indirectly in any manner resulting in the acquisition by the company of shares in any other body corporate, and
- (b) by reason of that acquisition or anything to be done in consequence thereof or in connection therewith that body corporate will become a subsidiary of the company,

a report made by accountants (who shall be named in the prospectus) upon—

- (i) the profits or losses of the other body corporate in respect of each of the five financial years immediately preceding the issue of the prospectus and
- (ii) the assets and liabilities of the other body corporate at the last date to which the accounts of the body corporate were made up

(2) The said report shall—

- (a) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired have concerned members of the company and what allowance would have fallen to be made, in relation to assets and liabilities so dealt with, for holders of other shares if the company had at all material times held the shares to be acquired, and
- (b) where the other body corporate has subsidiaries deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiaries in the manner provided by sub-clause (3) of clause 24 of this Schedule in relation to the company and its subsidiaries

Part III—Provisions applying to Parts I & II of Schedule

27 Clause 1 (so far as it relates to the contents of the memorandum and particulars of the signatories and the shares subscribed for by them) and clause 14 (so far as it relates to preliminary expenses) of this Schedule shall not apply in the case of a prospectus issued more than two years after the date at which the company is entitled to commence business

28 Every person shall for the purposes of this Schedule, be deemed to be a vendor who has entered into any contract, absolute or conditional, for the sale or purchase, or for any option of purchase, of any property to be acquired by the company, in any case where—

- (a) the purchase money is not fully paid at the date of the issue of the prospectus,
- (b) the purchase money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus,
- (c) the contract depends for its validity or fulfilment on the result of that issue

29 Where any property to be acquired by the company is to be taken on lease, this Schedule shall have effect as if the expression "vendor" included the lessor, and the expression "purchase money" included the consideration for the lease, and the expression "sub-purchaser" included a sub-lessee

30 References in clause 8 of this Schedule to subscribing for shares or debentures shall include acquiring them from a person to whom they have been allotted or agreed to be allotted with a view to his offering them for sale

31 For the purposes of clause 12 of this Schedule where the vendors or any of them are a firm, the members of the firm shall not be treated as separate vendors

32 If in the case of a company which has been carrying on business, or of a business which has been carried on for less than five years, the accounts of the company or business have only been made up in respect of four years, three years, two years or one year, Part II of this Schedule shall have effect as if references to four years, three years, two years or one year, as the case may be, were substituted for references to five years

33 The expression "financial year" in Part II of this Schedule means the year in respect of which the accounts of the company or of the business, as the case may be, are made up, and where by reason of any alteration of the date on which the financial year of the company or business terminates the accounts of the company or business have been made up for a period greater or less than a year, that greater or less period shall for the purpose of that Part of this Schedule be deemed to be a financial year

34 Any report required by Part II of this Schedule shall either indicate by way of note any adjustments as respects the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary or shall make those adjustments and indicate that adjustments have been made

35 Any report by accountants required by Part II of this Schedule shall be made by accountants qualified under this Act for appointment as auditors of a company and shall not be made by any accountant who is an officer or servant, or a partner of or employs an officer or servant, of the company or of the company's subsidiary or holding company or of a subsidiary of the company's holding company, and for the purposes of this clause the expression "officer" shall include a proposed director but not an auditor

21 REDRAFT OF SECTION 105 C

(Page 301 of the Annexure and paragraph 52 of the Report)

105-C (1) Where, at any time subsequent to the first allotment of shares in a company it is decided to increase the subscribed capital of a company then, subject to any direction to the contrary that may be given by the company in general meeting sanctioning the issue, such shares shall be offered to the persons who at the date of the offer are the holders of the equity share capital of the company in proportion, as nearly as circumstances permit, to the amount then paid up or credited as paid up on such equity share capital so held by them. The offer shall be made by notice specifying the number of shares offered and limiting a time, being not less than ^{Furtl} days from the date of the offer, within which the offer, if not accepted, will be deemed to be declined, and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to the amount paid up or credited as paid up on the equity share capital held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this section ^{issue} ^{capiti}

(2) In this section the expression "equity share capital" means, in relation to a company, its subscribed share capital excluding any part thereof which on a distribution, as respects dividends carries no right to participate beyond a fixed and certain amount and, as respects capital carries no right to participate beyond the amount paid up or credited as paid up thereon together with any fixed premium specified in the company's memorandum or articles

(3) Sub-section (1) of this section shall apply notwithstanding any provision to the contrary contained in the memorandum or articles of association of a company or in any agreement entered into by the company with a third party

(4) Unless the articles of association of a company provide to the contrary any offer of shares made to a member shall be deemed to include a right exercisable by such member to renounce such shares or any part thereof in favour of a third party but nothing contained in this sub-section shall be deemed to extend the time within which such offer must be accepted nor to authorise any member to exercise such right of renunciation more than once

(5) This section shall not apply to a private company

**22 REDRAFTS OF ACCOUNTS SECTIONS 130 TO 135
WHICH MAY BE RENUMBERED AS 130 TO 135, AND
135A TO 135B**

(Page 304 of the Annexure and paragraphs 147—170 of the Report)

Statements, Books and Accounts

Books to be kept by Company and penalty for not keeping proper books

130 (1) Every company shall cause to be kept proper books of account with respect to—

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place,

(b) all sales and purchases of goods by the company,

(c) the assets and liabilities of the company

(2) For the purposes of foregoing sub-section, proper books of account shall not be deemed to be kept with respect to the matters aforesaid if there are not kept such books as are necessary to give a true and fair view of the state of the company's affairs and to explain its transactions

(3) The books of account shall be kept at the registered office of the company or at such other place in India as the directors think fit, and shall at all times be open to inspection by the directors

(4) Where a company has a branch office, the company shall be deemed to have complied with the provisions of sub-section (1) and sub-section (3) if proper books of account relating to the transactions effected at the branch office are kept at the branch office and proper summarised returns, made up to dates at intervals of not more than two months, are sent by the branch office to the registered office of the company or other place referred to in sub-section (3)

(5) In the case of a company managed by a managing agent the managing agent, or where the managing agent is a firm or company, the partner or director of such firm or company and in any other case the director or directors who have knowingly by their act or omission been the cause of any default by the company in complying with the requirements of this section, shall in respect of such offence be liable to a fine not exceeding one thousand rupees

131 (1) The directors of every company shall at some date not later than eighteen months after the incorporation of the company and subsequently not later than nine months from the close of every financial year of the company lay before the company in general meeting a balance sheet and profit and loss account or in the case of a company not trading for profit an income and expenditure account for the period, in the case of the first account since the incorporation of the company and in any other

Annual
Balance
Sheet

case since the preceding account, made up to a date not earlier than the date of the meeting by more than nine months

Provided that the Registrar may for any special reason extend the period by a period not exceeding six months

(2) If any person being a director of a company fails to take all reasonable steps to comply with the provisions of this section, he shall, in respect of each offence, be liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding one thousand rupees

Provided that a person shall not be sentenced to imprisonment for such an offence unless, in the opinion of the Court dealing with the case, the offence was committed wilfully

132 (1) Every balance sheet of a company shall give a true and fair view of the state of affairs of the company as at the end of its financial year and every profit and loss account of a company shall give a true and fair view of the profit or loss of the company for the financial year

Contents of
Balance
Sheet and
Profit and
Loss
accounts

(2) The balance sheet shall be in the form marked "F" in the —Schedule to this Act or as near thereto as circumstances permit

(3) The profit and loss account shall comply with the requirements of the—Schedule so far as applicable thereto

(4) The balance sheet and the profit and loss account of a company shall not be deemed to be or treated as not disclosing a true and fair view merely by reason of the fact that—

- (a) the matters (to be indicated) which according to the Banking Companies Act and the Insurance Act are not required to be disclosed and which according to the form of the balance sheet and the schedule relating to the profit and loss account need not be disclosed are not disclosed, or
- (b) the valuations of assets have been stated according to the requirements of the form and not at their realisable values, or
- (c) the reserves and provisions which are not materials are not treated as reserves or provisions as the case may be, or
- (d) the presentation of items therein is made according to the requirements of the Act

(5) The Central Authority may, on the application or with the consent of a company's directors, modify in relation to that company any of the requirements of this Act as to the matters to be stated in a company's balance sheet or profit and loss account (except the requirements of sub-section (1) of this section) for the purpose of adapting them to the circumstances of the company, provided such a modification shall not be made unless it is in the public interest

(6) If any person being a director, managing agent or manager or, where the managing agent is a firm or company, being a partner or director of such firm or company fails to take all reasonable steps to secure compliance as respects any accounts laid before the company in general meeting with the provisions of this section and with the other requirements of this Act as to the matters to be stated in accounts, he shall in respect of each offence, be liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding one thousand rupees

Provided that a person shall not be sentenced to imprisonment for any such offence unless, in the opinion of the Court dealing with the case, the offence was committed wilfully

(7) For the purposes of this section and the following provisions of this Act, except where the context otherwise requires—

- (a) any reference to a Balance Sheet or Profit and Loss Account shall include any notes thereon or document annexed thereto giving information which is required by this Act and is thereby allowed to be so given, and
- (b) any reference to a Profit and Loss Account shall be taken in the case of a company not trading for profit, as referring to its income and expenditure account and references to profit or to loss shall be construed accordingly

Balance Sheet to include particulars as to subsidiary companies

133 (1) Where a company, in this Act referred to as the holding company, has at the end of its financial year a subsidiary company or two or more subsidiary companies there shall be annexed to the balance sheet of the holding company made out as at that date the balance sheet, profit and loss account, directors' report and auditors' report of such subsidiary company or companies together with a statement signed by the persons by whom in pursuance of section 136 the balance sheet of the holding company is signed stating the extent of the holding company's interest in each subsidiary company as at the close of such subsidiary company's immediately preceding financial year

(2) The balance sheet, profit and loss account and reports of each subsidiary company to be annexed to the holding company's balance sheet in accordance with subsection (1) shall be made out in accordance with the requirements of this Act and shall relate to the whole of the subsidiary company's immediately preceding financial year which shall end on a date not earlier than six months from the date as at which the balance sheet of the holding company is made out, provided that it shall be sufficient compliance with the requirements of this sub-section if two or more balance sheets, accounts and reports of a subsidiary company relating to the period specified are so annexed

(3) Where on any case the financial year of any subsidiary company does not coincide with its holding company's own financial year, then the statement to be attached to the holding company's balance sheet shall, in addition to the matters referred to in sub-section (1) hereof contain the following information in respect of each such subsidiary company

- (a) Whether there has been any, and if so what, change in the holding company's interest in the subsidiary company between the closing of the subsidiary company's immediately preceding financial year and the closing of the holding company's financial year
- (b) Details, if material, of any changes that have occurred between the closing of the subsidiary company's immediately preceding financial year and the closing of the holding company's financial year in respect of the subsidiary company's fixed assets, investments, loans made by the subsidiary company and monies borrowed by it other than those to meet current liabilities

(4) If for any reason the directors of the holding company are unable to obtain such information as is necessary for the preparation of the statement aforesaid, the directors who sign the balance sheet shall so report in writing and their report shall be annexed to the balance sheet in lieu of the statement

(5) Where it appears to the Central Authority desirable for a holding company or a holding company's subsidiary to extend its financial year so that the subsidiary's financial year may end with that of the holding company or on a date not earlier than six months from the close of the holding company's financial year, and for that purpose to postpone the submission of the relevant accounts to a general meeting, the Central Authority may on the application or with the consent of the directors of the company whose financial year is to be extended direct that, in the case of that company, the submission of accounts to a general meeting the holding of an annual general meeting or the making of an annual return shall not be required to be submitted, held or made earlier than so directed notwithstanding any provision to the contrary contained in this Act or in any other Act for the time being in force

(6) The holding company may by a resolution authorise representatives named in the resolution to inspect the books of account kept in accordance with section 130 by any subsidiary company, and on such resolution being passed those books of account shall be open to inspection by those representatives at any time during business hours

(7) The rights conferred by section upon members of a company may be exercised in respect of any subsidiary company by members of the holding company as if they were members of that subsidiary company

(8) If any person being a director of a holding company fails to take all reasonable steps to comply with the provisions of this section he shall, in respect of each offence, be liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding one thousand rupees

Provided that a person shall not be sentenced to imprisonment for such an offence unless, in the opinion of the Court dealing with the case, the offence was committed wilfully

Authentica-
tion of
Balance
Sheet and
Profit and
Loss
Account

134 (1) Save as provided by sub-section (2) every balance sheet of a company and every profit and loss account shall be signed on behalf of the Board—

- (i) in the case of a banking company by the manager or secretary (if any) and where there are more than three directors of the company, by at least three of those directors and where there are not more than three directors, by all the directors,
- (ii) in the case of any other company by at least two directors one of whom shall be a managing director of the company if the company has a managing director and by the managing agent or manager (if any) of the company

(2) When the total number of directors of the company for the time being in India is less than the number of directors whose signatures are required by sub-section (1), then the balance sheet and profit and loss account shall be signed by all the directors for the time being in India, or, if there is only one director for the time being in India by such director, but in such a case there shall be subjoined to the balance sheet and profit and loss account a statement signed by such directors or director explaining the reason for non-compliance with the provisions of sub-section (1)

(3) The balance sheet and profit and loss account shall be approved by the Board of directors before such balance sheet and profit and loss account are signed on their behalf in accordance with the provisions of this section and before they are submitted to the auditors for their report thereon

(4) The profit and loss account shall be annexed to the balance sheet and the auditors' report made out in accordance with the provisions of section 145B shall be attached thereto

(5) If any copy of a balance sheet or profit and loss account which has not been signed as required by this section is issued, circulated or published or if any copy of a balance sheet is issued, circulated or published without having annexed thereto a copy of the profit and loss account or any accounts which by virtue of section 133 are required to be annexed thereto, or without having attached a copy of the auditors' report and a copy of the directors'

report made out in accordance with section 135, the company and every officer of the company who is in default shall be liable to a fine not exceeding five hundred rupees

135 (1) The directors shall make out and attach to every balance sheet a report with respect to the state of the company's affairs, the amount, if any, which they recommend should be paid by way of dividend and the amount, if any, which they propose to carry to the Reserve Fund, General Reserve or Reserve Account shown specifically on the balance sheet or to a Reserve Fund, General Reserve or Reserve Account to be shown specifically in a subsequent balance sheet Directors' Report

(2) The said report shall deal, so far as is material for the appreciation of the company's affairs by its members and will not in the directors' opinion be harmful to the business of the company or of any of its subsidiaries, with any change during the financial year in the nature of the company's business, or in the company's subsidiaries, or in the class of business in which the company has an interest, whether as a member of another company or otherwise. Where the auditors have made any reservation or qualification in their report the directors shall be bound to comment on such reservation or qualification

(3) The said report may be signed by the chairman of the directors if authorised in that behalf by the directors

135A (1) A copy of every balance sheet including every document required by law to be annexed or attached thereto which is to be laid before a company in general meeting together with a copy of the auditors' report, shall not less than twenty-one days before the date of the meeting, be sent to every member of the company (whether he is or is not entitled to receive notices of general meetings of the company), every trustee for holders of debentures of the company (whether he is or is not so entitled) and all persons other than members of the company, being persons so entitled Right of member of company to copies of the balance sheet and auditors' report

Provided that—

- (a) in the case of a company not having a share capital this sub-section shall not require the sending of a copy of the documents aforesaid to a member of the company who is not entitled to receive notices of general meetings of the company or to a trustee for holders of debentures of the company who is not so entitled,
- (b) this sub-section shall not require a copy of those documents to be sent—
 - (1) to a trustee for holders of debentures of the company who is not entitled to receive notices of general meetings of the company and of whose address the company is unaware,

- (11) to more than one of the joint-holders of any shares none of whom are entitled to receive such notices, or
- (11) in the case of joint-holders of any shares or debentures some of whom are and some of whom are not entitled to receive such notices, to those who are not so entitled, and
- (c) if the copies of the documents aforesaid are sent less than twenty-one days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by all the members entitled to attend and vote at the meeting

(2) Any member of a company, whether he is or is not entitled to have sent to him copies of the company's balance sheets, and any trustee for holders of debentures of the company, whether he is or is not so entitled, shall be entitled to be furnished on demand without charge with a copy of the last balance sheet of the company, including every document required by law to be annexed thereto, together with a copy of the auditors' report

(3) If default is made in complying with sub-section (1) of this section, the company and every officer of the company who is in default shall be liable to a fine not exceeding five hundred rupees, and if, when any person makes a demand for any document with which he is by virtue of sub-section (2) of this section entitled to be furnished, default is made in complying with the demand within seven days after the making thereof, the company and every officer of the company who is in default shall be liable to a default fine not exceeding five hundred rupees unless it is proved that that person has already made a demand for and been furnished with a copy of the document

(4) The foregoing provisions of this section shall not have effect in relation to a balance sheet of a private company laid before it before the commencement of this Act, and the right of any person to be furnished with a copy of any such balance sheet and the liability of the company in respect of a failure to satisfy that right shall be the same as they would have been if this Act had not been passed

Copy of
Balance
Sheet to be
forwarded
to the
Registrar

135B (1) After the balance sheet and profit and loss account have been laid before the company at the annual general meeting three copies thereof signed by the Manager or Secretary of the company together with three copies of all documents that are required by this Act to be annexed or attached to such balance sheet or profit and loss account, shall be filed with the Registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 32

(2) If the general meeting before which a balance sheet is laid does not adopt the balance sheet, a statement of that fact and of the reasons therefor shall be annexed to the balance sheet and to the copies thereof required to be filed with the Registrar

(3) The provisions of sub-section (1) hereof shall not apply to a private company but every private company shall, after its balance sheet and profit and loss account have been laid before the company at the annual general meeting, file with the Registrar at the same time as the copy of the annual list of members and summary prepared in accordance with the requirements of section 32 three copies of its balance sheet certified as true copies by the company's auditors together with the auditors' report in so far as it relates to the balance sheet

(4) If a company makes a default in complying with the requirements of this section, every officer of the company who knowingly and wilfully authorises or permits the default shall be liable to the like penalty as is provided by section 32 for a default in complying with the provisions of that section

- (l) A list of Investments separately classifying Trade Investments and Other Investments should be attached to the Balance Sheet stating the names of the companies (with the names of their managing agents, if any) in whose shares, debentures or bonds investments have been made and also stating the amounts in respect of each item, provided however that it shall not be necessary to give such particulars (a) in respect of Investments made by Managing Agency Companies in managed companies' shares debentures or bonds, (b) in respect of Investments made by Investment Companies with a stipulation that particulars in respect of Investments in shares of Private Companies shall be given. The amount in respect of the holdings by investment companies in unquoted shares or shares of private limited companies shall be separately stated, specifying the name of each such company and the amount invested therein.
- (m) If in the opinion of the Directors, any of the current assets have not a value on realisation in the ordinary course of business, at least equal to the amount at which they are stated, the fact that the Directors are of that opinion shall be stated.
- (n) Except in the case of the first Balance Sheet laid before the company after the commencement of the Act, the corresponding amounts for the immediately preceding financial year for all items shown in the Balance Sheet shall be also given in the Balance Sheet. The requirement in this behalf shall in the case of companies preparing quarterly or half yearly accounts relate to the profit and loss account for the period ended on the relative date of the previous year.
- (o) The amounts to be shown under Sundry Debtors shall include the amounts due in respect of goods sold or services rendered or in respect of other contractual obligations but shall not include the amounts which are in the nature of loans or advances. A debt which remains unrealised after a period of three months from the date on which the debit in respect of the same arose shall be treated as a loan or in advance and the amounts in this behalf shall for purposes of the Balance Sheet be treated as a loan or an advance and separately shown as such under the heading 'Loans and Advances'.

SCHEDULE

[vide redraft of Section 132(3)]

Requirements as to Profit and Loss Account

The Profit and Loss Account or the Income and Expenditure Account shall be made out in such form as to give a clear disclosure of the result for the period covered by the account. It shall also disclose any material feature which includes credits or receipts in respect of extraneous or non-recurrent transactions or transactions of an exceptional nature. The Profit and Loss Account or the Income and Expenditure Account shall disclose the various items stating the income and the expenditure of the company arranged under most convenient heads and in particular it shall disclose the following information—

- (i) The turn-over, selling agents' commission, brokerage and discount on sales other than the usual trade discount, the purchases, the opening stocks and the closing stocks in the case of manufacturing or trading concerns and the gross income in respect of services rendered or supplied in the case of concerns rendering or supplying such services and the gross income under different heads in respect of other concerns, provided however that in the case of concerns which have works in progress the amounts in this behalf at the commencement and at the end of the year shall also be stated
- (ii) Provision for depreciation of fixed assets—provided that, if provision is not made by means of a depreciation charge, the method of making such a provision for depreciation, renewal or diminution in value of fixed assets in respect thereof shall be stated. If no provision is made for depreciation the fact that no such provision has been made shall be stated
- (iii) The amount of interest on the company's debentures and other fixed loans stating separately the amount of interest payable to managing agents
- (iv) The amount of charge for income-tax and other taxation of profits
- (v) The amounts respectively provided for redemption of share capital and for redemption of loans
- (vi) The aggregate, if material, of any amounts set aside to reserves other than provisions made to meet any specified liability, contingency or commitment known to exist at the date of the balance sheet
- (vii) The aggregate, if material, of amounts withdrawn from reserves
- (viii) The aggregate, if material, of the amount set aside to provisions made for specific liabilities,

contingencies or commitments and the aggregate, if material, credited in respect of provisions made for specific liabilities, contingencies or commitments no longer required

- (ix) The amount of income from investments The amount of income-tax deducted shall also be stated if the amount of income is stated at the gross figure
- (x) Other interest income specifying the nature thereof
- (xi) Dividends from subsidiary companies
- (xii) Provisions for losses of subsidiary companies
- (xiii) Dividends paid or proposed disclosing whether such amounts are subject to deduction of income-tax or not
- (xiv) Consumption of stores and spare parts
- (xv) Salaries, wages and bonus
- (xvi) Power and fuel
- (xvii) Rent, rates and taxes excluding taxes on income
- (xviii) Insurance
- (xix) Repairs to buildings
- (xx) Repairs to machinery
- (xxi) Workmen and staff welfare expenses
- (xxii) Contribution to provident and other funds
- (xxiii) Profits or losses on investments
- (xxiv) Miscellaneous expenses
- (xxv) Profits or losses in respect of transactions of a sort not usually undertaken by the company or otherwise by circumstances of an exceptional or non-recurrent nature if material in amount
- (xxvi) Amount, if material, by which any items shown in the Profit and Loss Account are affected by any change in the basis of accounting

2 The Profit and Loss Account or the Income and Expenditure Account should also contain or give by way of the following further information —

- (i) The total of the amounts payable to the managing agents if any whether as fees, percentages or otherwise for services rendered as managing agents or otherwise
- (ii) The total of the amounts payable whether as fees, percentages or otherwise to the directors, managing directors or managers respectively as

remuneration for services in their capacity as directors or managing directors or managers or otherwise. If any director of the company is by virtue of the nomination, whether direct or indirect, of that company a director of any other company, any remuneration or other emoluments received by him for his own use whether as director or otherwise in connection with the management of that other company shall be shown in a note at the foot of the account or in a statement attached thereto. Particulars of the amounts received by individual directors shall be separately given for each of the subsidiaries.

- (iii) The aggregate amounts of any compensation paid to managing agents, directors or former managing agents or directors of the company

(a) as such, and

(b) otherwise

for loss of office in connection with or arising out of their retirement from the company or from any other company in which the director is a director by virtue of the nomination, whether direct or indirect, of the company sub-divided to show the amounts paid respectively—

(a) by the company,

(b) by such other companies, and

(c) by any other person

- (iv) The aggregate amounts of any pension paid to directors or former directors of the company

(a) as such, and

(b) otherwise

sub-divided to show the amounts paid respectively—

(a) by the company, and

(b) by any subsidiary company

3 Except in the case of the first Profit and Loss Account laid before the company after the commencement of the Act—the corresponding amounts for the immediately preceding financial year for all items shown in the Profit and Loss Account shall also be given in the Profit and Loss Account or the Income and Expenditure Account

The requirement in this behalf shall in the case of companies preparing quarterly or half-yearly accounts relate to the Profit and Loss Account for the period ended on the relative date of the previous year

4 The Central Authority may direct that a company shall not be obliged to show the amount set aside to provisions other than those relating to depreciation, renewal or diminution in value of assets if it is satisfied that

the same should not be disclosed in public interest and would prejudice the company but subject to the condition that in any heading stating an amount arrived at after taking into account the amount set aside as such, provision shall be so framed or marked as to indicate that fact

Interpretation

5 (1) For the purposes of the Schedule for the Profit and Loss Account and for the purposes of the form of the Balance Sheet, unless the context otherwise requires,—

- (a) the expression “provision” shall, subject to subparagraph (2) of this paragraph, mean any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets or retained by way of providing for any known liability which the amount of cannot be determined with substantial accuracy,
- (b) the expression “reserve” shall not, subject as aforesaid, include any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets or retained by way of providing for any known liability,
- (c) the expression “capital reserve” shall not include any amount regarded as free for distribution through the profit and loss account and the expression “revenue reserve” shall mean any reserve other than a capital reserve,

and in this paragraph the expression “liability” shall include all liabilities in respect of expenditure contracted for and all disputed or contingent liabilities

(2) Where—

- (a) any amount written off or retained by way of providing for depreciation, renewals or diminution in value of assets, not being an amount written off in relation to fixed assets before the commencement of this Act, or
- (b) any amount retained by way of providing for any known liability,

is in excess of that which in the opinion of the directors is reasonably necessary for the purpose, the excess shall be treated for the purposes of this Schedule as a reserve and not as a provision

For the purposes aforesaid, the expression “quoted investment” means an investment as respects which there has been granted a quotation or permission to deal on a recognised stock exchange, or on any stock exchange of repute outside India, and the expression “unquoted investment” shall be construed accordingly

•23 REDRAFTS OF AUDITORS SECTIONS 144 AND 145 WHICH MAY BE RENUMBERED AS SECTIONS 144, 145, 145A AND 145B

(Page 308 of the Annexure and paragraphs 171—182 of the Report)

144 (1) Every Company shall at each annual general meeting appoint an Auditor or Auditors to hold office from the conclusion of that, until the conclusion of the next annual general meeting and an Auditor or Auditors so appointed shall not be removed by the Company during the period of such office

Qualifications and appointment and powers and duties of auditors

(2) At any annual general meeting a retiring auditor, however appointed, shall be re-appointed without any resolution being passed unless—

- (a) he is not qualified for re-appointment, or
- (b) a resolution has been passed at that meeting appointing somebody instead of him or providing expressly that he shall not be re-appointed, or
- (c) he has given the company notice in writing of his unwillingness to be re-appointed

Provided that where notice is given of an intended resolution to appoint some person or persons in place of a retiring auditor, and by reason of the death, incapacity or disqualification of that person or of all these persons, as the case may be, the resolution cannot be proceeded with, the retiring auditor shall not be automatically re-appointed by virtue of this sub-section

(3) Where at an Annual General Meeting no auditors are appointed or re-appointed, the Central Authority may appoint a person to fill the vacancy

(4) The Company shall, within one week of the Central Authority's power under the last foregoing sub-section becoming exercisable, give it notice of that fact, and, if a Company fails to give notice as required by this sub-section, the Company and every officer of the Company who is in default shall be liable to a fine not exceeding five hundred rupees

(5) Subject as hereinafter provided, the first auditors of a company may be appointed by the directors at any time before the first annual general meeting, and auditors so appointed shall hold office until the conclusion of that meeting

Provided that—

- (a) the company may at a general meeting remove any such auditors and appoint in their place any other persons who have been nominated for appointment by any member of the Company and of whose nomination notice has been given to the members of the company not less than

fourteen days before the date of the meeting,
and

- (b) if the directors fail to exercise their powers under this sub-section, the company in general meeting may appoint the first auditors, and thereupon the said powers of the directors shall cease

(6) Subject to the provisions of sub-section (1) hereof the directors may fill any casual vacancy in the office of auditors but while any such vacancy continues, the surviving or continuing auditor or auditors, if any, may act

Provided, however, that where such casual vacancy is caused by the resignation of the auditor or auditors, such vacancy shall only be filled by the company in general meeting

(7) The remuneration of the auditors of a company—

- (a) in the case of an auditor appointed by the directors or by the Central Authority may be fixed by the directors or by the Central Authority as the case may be,
- (b) subject to sub-clause (a) above, shall be fixed by the company in general meeting or in such manner as the company in the general meeting may determine

Removal of
existing
auditors

145 (1) Special notice shall be required for a resolution at a company's annual general meeting appointing as auditor a person other than a retiring auditor or providing expressly that a retiring auditor shall not be reappointed

(2) On receipt of notice of such an intended resolution as aforesaid, the Company shall forthwith send a copy thereof to the retiring auditor, if any

(3) Where notice is given of such an intended resolution as aforesaid and the retiring auditor makes with respect to the intended resolution representations in writing to the Company not exceeding a reasonable length and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so—

- (a) in any notice of the resolution given to members of the Company, state the fact of the representations having been made, and
- (b) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the Company),

and if a copy of the representations is not sent as aforesaid because received too late or because of the Company's default, the auditor may (without prejudice to his right to be heard orally) require that the representations

shall be read out at the meeting

Provided that copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the Company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this Section are being abused to secure needless publicity for defamatory matters, and the Court may order the company's cost on an application under this section to be paid in whole or in part by the auditor, notwithstanding that he is not a party to the application

(4) The last foregoing sub-section shall apply to a resolution to remove the first auditor by virtue of sub-section (5) of the last foregoing section as it applies in relation to a resolution that a retiring auditor shall not be re-appointed

145A (1) No person shall be appointed to act as an auditor of any company unless he is a chartered accountant within the meaning of the Chartered Accountants Act, 1949 Qualifications of auditors

Provided that a firm whereof all the partners practising in India are chartered accountants may be appointed by its firm name to be auditor of a company and may act in the name of the firm

Provided further that only a partner of the firm of chartered accountants or the chartered accountant if he is practising individually shall sign the reports and financial statements of the company

(2) None of the following persons shall be qualified for appointment as auditor of a company—

- (a) an officer or servant of the company,
- (b) a person who is a partner of, or employs an officer or servant of the company,
- (c) a person indebted to the company to an amount exceeding Rs 1,000 or who has guaranteed indebtedness to the company of any third person to an extent exceeding the aforesaid amount, and if any person after being appointed auditor becomes so indebted to the company or guarantees to the company such indebtedness of any third person, his appointment shall thereupon be terminated,
- (d) a person who is a director or member of a private company or a partner of a firm which is the managing agent of the company,
- (e) a person who is a director of or the holder of shares exceeding five per cent in nominal value of the subscribed capital of any public company which is the managing agent of the company

Provided always that any shares held by such person as nominee or trustee for any third person and in which the holder has no beneficial

interest shall be excluded in computing the percentage of shares held by him for the purpose of this sub-clause

Powers and
duties of
auditors

145B (1) Every auditor of a company shall have a right of access at all times to the books, accounts and vouchers of the company, and shall be entitled to require from the directors and officers of the company such information and explanation as the auditor in his absolute discretion, thinks necessary for the performance of the duties of the auditor

(2) The auditor shall make a report to the members of the company on the accounts examined by him, and on every balance sheet and profit and loss account laid before the company in general meeting during his tenure of office and the report shall state—

- (a) whether he has obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purposes of his audit,
- (b) whether, in his opinion, proper books of account have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him,
- (c) (i) whether the company's balance sheet and profit and loss account dealt with by the report are in agreement with the books of account and returns,
- (ii) whether in his opinion and to the best of his information and according to the explanations given to him the said accounts give the information required by this Act in the manner so required and give a true and fair view—
- (aa) in the case of the balance sheet, of the state of the company's affairs as at the end of its financial year, and
- (bb) in the case of the profit and loss account, of the profit or loss for its financial year,

or, as the case may be, give a true and fair view thereof subject to the non-disclosure of matters (to be indicated in the report) which, according to the Banking Companies Act and the Insurance Act are not necessary to be disclosed, and which according to the form of the balance sheet and the Schedule relating to the profit and loss account need not be disclosed

The balance sheet and the profit and loss account shall not be deemed to be or treated as not disclosing a true and fair view for the mere reason that the valuations of assets have been stated according to the requirements

of the form and not at their realisable values or the reserves and provisions which are not material are not treated as Reserves or Provisions as the case may be or where the presentation of items is made according to the requirements of the Act

- (3) In the case of any company having a branch office, its branch accounts shall, unless the company in general meeting decides to the contrary, be audited by an accountant duly qualified to act as an auditor in accordance with the laws of the country in which such branch office is situate or by a chartered accountant within the meaning of the Chartered Accountants Act and where, in any case branch accounts are not so audited, the company's auditor shall be entitled to visit any branch office as he shall, in his absolute discretion, deem necessary for the performance of his duties as auditor and shall have a right of access at all times to the books and accounts and vouchers of the company maintained at such branch office notwithstanding the provisions of section 130(4) of this Act

Provided that in the case of a banking company, if the company has branch banks beyond the limits of India, it shall be sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in India

- (4) All notices of and other communications relating to any general meeting of a company which any member of the company is entitled to receive shall be forwarded to the auditor of the company and the auditor shall be entitled to attend any general meeting of the company and to be heard at any general meeting which he attends on any part of the business which concerns him as auditor

- (5) The auditor's report shall be read before the company in general meeting and shall be open to inspection by any member

- (6) If any auditor's report is made which does not comply with the requirements of this section, every auditor who is knowingly and wilfully a party to the default shall be punishable with fine which may extend to one thousand rupees

- (7) If a company makes default in complying with the provisions of this section, the company, and every officer of the company who knowingly and wilfully is a party to the default shall be punishable with fine which may extend to five hundred rupees

24 DRAFT OF A SECTION WHICH MAY BE INCORPORATED AS SECTION 153C

(Pages 310 and 311 of the Annexure and paragraphs 198—202 of the Report)

**Alternative
remedy to
winding up
in cases of
oppression.**

153C (1) Any members of a company, being a prescribed number of members, who complain that the affairs of the company are being conducted in a manner oppressive to some part of the members (including themselves) or, in a case falling within sub-section* () of section of this Act The Central Authority may make an application to the Court by petition for an order under this section

(2) If on any such petition the Court is of opinion—

- (a) that the company's affairs are being conducted as aforesaid, and
- (b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound up,

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares or interests of any members of the company by other members of the company or by the company and, in the case of a purchase by the company being a company having a share capital, for the reduction accordingly of the Company's capital or otherwise

Explanation—For the purposes of this section any material change after the commencement of this Act in the control of a company or, in the case of a company having a managing agent, any material change after the commencement of this Act in the composition of the managing agent (being a firm) or in the control of the managing agent (being a body corporate) may be deemed by the Court to constitute a fact which would justify the making of a winding-up order on the ground that it would be just and equitable that the company should be wound-up if the Court is satisfied that by reason of such change the interests of the company or of any of its members are or are likely to be unfairly and materially prejudiced

(3) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act but subject to the provisions of the order,

*Corresponding to sub section (3) of section 169 of the English Companies Act, 1948

the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order, but, subject to the foregoing provisions of this sub-section, the alternations or additions made by the order shall be of the same effect as if duly made by resolution of the company and the provisions of this Act shall apply to the memorandum or articles as so altered or added to accordingly

(4) An office copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within fifteen days, after the making thereof, be delivered by the Company to the Registrar of Joint Stock Companies for registration, and if a company makes default in complying with this sub-section, the company and every officer of the company who is in default shall be liable to a (default) fine

(5) It shall be lawful for the Court upon the application of any petitioner or of any respondent to a petition under this section, and upon such terms as shall appear to the Court to be just and equitable, to make any interim order it may think fit for regulating the conduct of the company's affairs pending the making of a final order on the petition

(6) In relation to a petition under this section, sections 235 and 236 of this Act shall apply as if the Company were in the course of being wound up (but with the omission from such section 235 of the words "made within three years from the date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust as the case may be whichever is longer") and proceedings under this section shall, for the purposes of section 235, be deemed to be proceedings commenced under that section by a contributory

(7) (a) In the case of a company having a share capital,

(i) not less than fifty in number of the members, or

(ii) not less than one-tenth in number of the members,
or

(iii) a member or members holding not less than one-tenth of the issued share capital of the company upon which all calls and other sums due have been paid, and

(b) In the case of a company not having a share capital, not less than one-fifth in number of the members

shall be a prescribed number of members for the purpose of this section and so that where two or more persons hold one or more shares jointly they shall, for the purposes of this section, be treated as a single member

Provided always that the Central Authority may, when it is satisfied that special circumstances exist as to warrant the relaxation of the provisions in this behalf, authorise any one or more members of a company to apply to the Court by petition for an order under this section on such member or members so authorised depositing in Court at the time of filing such petition such security, for costs, being not less than _____, as to the Central Authority shall appear reasonable

25 DRAFT OF A SECTION WHICH MAY BE INCORPORATED AS SECTION 153D

(Page 311 of the Annexure and paragraphs 198—202 of the Report)

153D (1) Any members of a company being a prescribed number of members who complain—

Alternative remedy to winding up in cases of gross mismanagement of the affairs of a Company

(a) that the management of the affairs of the company by its managing agent, managing director or manager is being conducted in a manner prejudicial to the interests of the company, or

(b) in the case of a company whose managing agent is a body corporate or a firm, that there has since the () been a material change in the control of such body corporate or a material change in the composition of such firm as the case may be and that by reason of such change the interests of the company have been or are or are likely to be unfairly and materially prejudiced or in a case falling within sub-section* of section of this Act the Central Authority may make an application to the Court by petition under this section

(2) If on any such petition the Court is of opinion—

(a) that the management of the affairs of the company by its managing agent, managing director or manager is being conducted as aforesaid, or, (as the case may be),

(b) that there has been such change in the control of such body corporate or in the composition of such firm and that by reason of such change the interests of the company have been or are or are likely to be prejudiced as aforesaid,

the Court may make an order determining any agreement howsoever constituted between the company and the managing agent, managing director or director

(3) It shall be lawful for the Court upon the application of any petitioner or of any respondent to a petition under this section, and upon such terms as shall appear to the Court to be just and equitable, to make any interim order it may think fit for regulating the conduct of the company's affairs pending the making of a final order on the petition

(4) In any case in which the Court makes an order under the provisions of sub-section (2) the Court may assess damages against the managing agent, managing director or manager and sections 235 and 236 of this Act shall apply as if the company were in the course of being wound up (but with the omission from such section 235 of the words

*Corresponding to sub section (3) of section 169 of the English Companies Act, 1948

“made within three years from the date of the first appointment of a liquidator in the winding up or of the mis-application, retainer, misfeasance or breach of trust as the case may be whichever is longer”) and proceedings under this section shall for the purposes of section 235 be deemed to be proceedings duly commenced under that section by a contributory

(5) The determination of any agreement between the company and the managing agent, managing director or manager by virtue of an order made under this section shall not give rise to any claim on the part of the managing agent, managing director or manager for damages or for compensation for loss of office or otherwise and whether under such agreement or otherwise

(6) In this section the expression “a prescribed number of members” shall mean (a) in the case of a company having a share capital a member or members holding not less than one-tenth of the issued share capital of the company upon which all calls and other sums due have been paid and (b) in the case of a company not having a share capital not less than one-fifth in number of the members

26 DRAFT OF A SECTION WHICH MAY BE INCORPORATED AS SECTION 153E

(Page 311 of the Annexure and paragraphs 198—202 of the Report)

153E (1) If any agreement between a company and a managing agent, or a managing director or a manager shall be determined by virtue of an order made under the last foregoing section neither such managing agent nor any associate of such managing agent, nor such managing director or manager shall, without the leave of the Court, be appointed or re-appointed or act as managing agent, managing director or manager of the company for a period of five years from the date of the order

Disqualifications of directors, managing agents, managers and others found guilty of oppression or gross mismanagement

(2) If any person or body corporate acts as a managing agent, managing director or manager in contravention of this section then such person and, in the case of a body corporate, each of its directors shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand rupees or to both

(3) The leave of the Court for the purposes of this section shall not be given unless notice of intention to apply therefor has been served on the Central Authority, and it shall be the duty of the Central Authority, if it is of opinion that it is contrary to the public interest that any such application should be granted to attend on the hearing of and oppose the granting of the application

**27 REDRAFTS OF SECTIONS 277 TO 277E WHICH
MAY BE RENUMBERED AS SECTIONS 277 TO
277E AND 277E 1 to 277E 10**

(Corresponding to sections 407 to 423 of the English Act)

(Pages 332 and 333 of the Annexure and paragraphs 223 and 224 of the Report)

**Companies
incorporat-
ed outside
India**

277 The next eight following sections shall apply to all oversea companies, that is to say, companies incorporated outside India which, after the commencement of this Act, establish a place of business within India, and companies incorporated outside India which have, before the commencement of this Act, established a place of business within India and continue to have an established place of business within India at the commencement of this Act

**Provisions
as to estab-
lishment of
place of
business in
India**

277A (1) Oversea companies which, after the commencement of this Act, establish a place of business within India shall, within one month of the establishment of the place of business, deliver to the Registrar of Joint Stock Companies for registration —

- (a) a certified copy of the charter, statutes or memorandum and articles of the company or other instrument constituting or defining the constitution of the company, and, if the instrument is not written in the English language, a certified translation thereof,
- (b) the full address of the registered or principal office of the company,
- (c) a list of the directors and secretary of the company containing the particulars mentioned in the next following sub-section,
- (d) the names and addresses of some one or more persons resident in India authorised to accept on behalf of the company service or process and any notices required to be served on the company,
- (e) the full address of that office of the company in India which is to be deemed the principal place of business in India of the company

(2) The list referred to in paragraph (b) of the foregoing sub-section shall contain the following particulars, that is to say —

(a) with respect to each director,—

- (1) in the case of an individual, his present name in full and any former name or names, his usual residential address, his nationality and his

business occupation, if any, or if he has no business occupation but holds any other directorship or directorships, particulars of that directorship or of some one of those directorships, and

(11) in the case of a corporation, its corporate name and registered or principal office,

(b) with respect to the secretary or, where there are joint secretaries, with respect to each of them,—

(i) in the case of an individual, his present name, any former name or names and his usual residential address, and

(11) in the case of a corporation, its corporate name and registered or principal office

Provided that, where all the partners in a firm are joint secretaries of the company, the name and principal office of the firm may be stated instead of the particulars mentioned in paragraph (b) of this sub-section

(3) Oversea companies, other than those mentioned in sub-section (1) of this section, shall, if at the commencement of this Act they have not delivered to the Registrar the documents and particulars specified in sub-section (1) of section two hundred and seventy-seven of the present Indian Companies Act, 1913, continue subject to the obligation to deliver those documents and particulars in accordance with the said Act of 1913

277B If any alteration is made in—

(a) the charter, statutes, or memorandum and articles of an overseas company or any such instrument as aforesaid, or

(b) the registered or principal office of the company, or

(c) the directors or secretary of an overseas company or the particulars contained in the list of the directors and secretary, or

(d) the names or addresses of the persons authorised to accept service on behalf of an overseas company, or

(e) the principal place of business of the company in India,

Return to
be delivered
to Registrar
by overseas
company
where
documents,
etc., altered.

the company shall, within the prescribed time, deliver to the Registrar for registration a return containing the prescribed particulars of the alteration

Accounts of
oversea com-
pany

277C (1) Every oversea company shall, in every calendar year, make out a balance sheet and profit and loss account in such form, and containing such particulars and including or having annexed thereto or attached therewith such documents as under the provisions of this Act (subject, however, to any exceptions that may from time to time be prescribed by the Central Government) it would, if it had been a company within the meaning of this Act, have been required to make out and lay before the company in general meeting, and deliver three copies of those documents to the Registrar of Joint Stock Companies

(2) If any such document as is mentioned in the foregoing sub-section is not written in the English language, there shall be annexed to it a certified translation thereof

(3) Every oversea company shall send to the Registrar with the accounts required to be delivered to him, under sub-section (1) a list in the prescribed form of all places of business established by the company in India as at the date to which the balance sheet referred to in sub-section (1) is made up

Obligation
to state
name of
oversea
company
whether
limited and
country
where in-
corporated

277D Every oversea company shall—

- (a) in every prospectus inviting subscriptions for its shares or debentures in India state the country in which the company is incorporated, and
- (b) conspicuously exhibit on every place where it carries on business in India the name of the company and the country in which the company is incorporated in letters easily legible in English characters and also, if any place where it carries on business is beyond the local limits of the ordinary original civil jurisdiction of a High Court, in the characters of one of the vernacular languages used in that place, and
- (c) cause the name of the company and of the country in which the company is incorporated to be stated in legible English characters in all bill-heads and letter papers, and in all notices, advertisements and other official publications of the company, and
- (d) if the liability of the members of the company is limited, cause notice of the fact to be stated in legible characters in every such prospectus as aforesaid and in all bill heads, letter papers, notices, advertisements and other official publications of the company in India, and to be affixed on every place where it carries on its business

Service on
oversea
company

277E Any process or notice required to be served on oversea company shall be sufficiently served if addressed to any person whose name has been delivered to the Registrar under the foregoing provisions of this Part of this

Act and left at or sent by post to the address which has been so delivered,

Provided that—

- (a) where any such company makes default in delivering to the Registrar the name and address of a person resident in India who is authorised to accept on behalf of the company service of process or notices, or
- (b) if at any time all the persons whose names and addresses have been so delivered are dead or have ceased so to reside, or refuse to accept service on behalf of the company, or for any reason cannot be served,

a document may be served on the company by leaving it at or sending it by post to any place of business established by the company in India

277E1 (1) Any document, which any overseas company is required to deliver to the Registrar of Joint Stock Companies, shall be delivered to the Registrar of Joint Stock Companies, New Delhi and references to the Registrar of Joint Stock Companies in this Part of this Act except in sub-section (2) shall be construed accordingly

Office where documents to be filed.

(2) Any such document as is mentioned in sub-section (1) above shall also be delivered to the Registrar of Joint Stock Companies in the State in which the principal place of business of the company is situated

(3) If any overseas company ceases to have a place of business in any State of India, it shall forthwith give notice of the fact to the Registrar of Joint Stock Companies, and as from the date on which notice is so given the obligation of the company to deliver any document to the Registrar shall cease, provided it has no other place of business in India

277E2 If any overseas company fails to comply with any of the foregoing provisions of this Part of this Act the company and every officer or agent of the company who knowingly and wilfully authorises or permits the default shall be liable to a fine not exceeding one thousand rupees

Penalties.

Provided always that the failure on the part of any overseas company to comply with any of the foregoing provisions of this Part of the Act shall not affect the validity of any contract, dealing or transaction entered into by such company, but such company shall not be entitled to bring any action, set off, counter claim or legal proceedings in respect of any such contract, dealing or transaction until it shall have so complied with this Part of the Act

Registration
of charges,
appointment
of receivers
and books
of account

277E 3 (1) The provisions of sections 109 to 117, both inclusive, and 120 to 125, both inclusive, shall extend to charges on properties in India which are created and to charges on property in India which is acquired by any over-sea company. Provided that where a charge is created outside India or the completion of the acquisition of the property takes place outside India, sub-clause (1) of the proviso to sub-section (1) of section 109 and the proviso to sub-section (1) of section 109A shall apply as if the property wherever situated were situated outside India.

(2) The provisions of sections 118 and 119 shall *mutatis mutandis* apply to the case of all over-sea companies and the provisions of section 130 shall apply to such companies to the extent of requiring them to keep at their principal place of business in India the books of account required by that section with respect to money received and expended, sales and purchases made, and assets and liabilities in relation to their business in India.

(3) In construing the sections referred to in sub-sections (1) and (2) of this section for the purposes of this section references in such sections to the Registrar shall be deemed to be references to the Registrar of Joint Stock Companies, New Delhi, and references to the registered office of the company shall be deemed to be references to the principal place of business in India of the over-sea company.

(NB—The references in this section are to sections in the 1913 Act)

Interpreta-
tion of fore-
going sec-
tions

277E 4 (1) For the purposes of the foregoing provisions of this Part of this Act —

the expression “certified” means certified in the prescribed manner to be a true copy or a correct translation,

the expression “director” in relation to a company includes any person in accordance with whose directions or instructions the directors of the company are accustomed to act,

the expression “place of business” includes a share transfer or share registration office,

the expression “prospectus” has the same meaning as when used in relation to the company incorporated under this Act,

the expression “secretary” includes any person occupying the position of secretary by whatever name called

(2) There shall be paid to the Registrar for registering any document required by the foregoing provisions of this Part of the Act to be filed with him such fees as may be prescribed.

Prospectus

277E 5 (1) It shall not be lawful for any person to issue, circulate or distribute in India any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India unless the prospectus is dated and

Dating of prospectus and particulars to be contained therein

(a) contains particulars with respect to the following matters —

- (i) the instrument constituting or defining the constitution of the company,
- (ii) the enactments or provisions having the force of an enactment, by or under which the incorporation of the company was effected,
- (iii) an address in India where the said instrument, enactments, or provisions, or copies thereof, and if the same are in a foreign language a translation thereof certified in the prescribed manner, can be inspected,
- (iv) the date on which and the country in which the company was incorporated,
- (v) whether the company has established a place of business in India, and, if so, the address of its principal office in India,

(b) subject to the provisions of this section, states the matters specified in Part I of the Schedule to this Act and sets out the reports specified in Part II of that Schedule, subject always to the provisions contained in Part III of that Schedule

Provided that in the application of Part I of the Schedule for the purposes of this sub-section, clause 2 thereof shall have effect with the substitution, for the reference to the articles, of a reference to the constitution of the company

(2) Any condition requiring or binding an applicant for shares or debentures to waive compliance with any requirement imposed by virtue of paragraph (a) or (b) of the foregoing sub-section, or purporting to affect him with notice of any contract, document or matter not specifically referred to in the prospectus, shall be void

(3) Subject to the provisions of sub-section (2) of section 277E 10 of this Act it shall not be lawful for any person to issue to any person in India a form of application for shares in or debentures of such a company or intended company as is mentioned in sub-section (1) of this section unless the form is issued with a prospectus which complies with this

Part of this Act and the issue whereof in India does not contravene the provisions of section 277E 6 of this Act

Provided that this sub-section shall not apply if it is shown that the form of application was issued in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to the shares or debentures

(4) In the event of non-compliance with or contravention of any of the requirements imposed by paragraphs (a) and (b) of sub-section (1) of this section, a director or other person responsible for the prospectus shall not incur any liability by reason of the non-compliance or contravention, if—

- (a) as regards any matter not disclosed he proves that he was not cognisant thereof, or
- (b) he proves that non-compliance or contravention arose from an honest mistake of fact on his part, or
- (c) the non-compliance or contravention was in respect of matters which, in the opinion of the Court dealing with the case, were immaterial or were otherwise such as ought in the opinion of that Court, having regard to all the circumstances of the case, reasonably to be excused

Provided that, in the event of failure to include in a prospectus a statement with respect to the matters contained in clause 18 of the Schedule to this Act no director or other person shall incur any liability in respect of the failure unless it be proved that he had knowledge of the matters not disclosed

(5) This section shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to shares in or debentures of the company, whether an applicant for shares or debentures will or will not have the right to renounce in favour of other persons but, subject as aforesaid, this section shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently

(6) Nothing in this section shall limit or diminish any liability which any person may incur under the general law or this Act, apart from this section

provisions
as to ex-
ert's
nsent and
lotment

277E 6 (1) It shall not be lawful for any person to issue, circulate or distribute in India any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India—

- a) if, where the prospectus includes a statement purporting to be made by an expert, he has not given, or has before delivery of the prospectus for registration withdrawn, his written consent to the issue of the prospectus with the statement included in the form and context in which it is included or there does not appear in the prospectus a statement that he has given and has not withdrawn his consent as aforesaid, or
- (b) if the prospectus does not have the effect where an application is made in pursuance thereof, of rendering all persons concerned bound by all the provisions (other than penal provisions) of sections 105 and 106 of this Act so far as applicable

(2) In this section the expression "expert" includes engineer, valuer, accountant and any other person whose profession gives authority to a statement made by him, and for the purposes of this section a statement shall be deemed to be included in a prospectus if it is contained therein or in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith

277E 7 (1) It shall not be lawful for any person to issue, circulate or distribute in India any prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India, a copy thereof certified by the chairman and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar of Joint Stock Companies, and the prospectus states on the face of it that a copy has been so delivered, and there is endorsed on or attached to the copy—

Registration
of prospec-
tus

- (a) any consent to the issue of the prospectus required by the last foregoing section,
- (b) a copy of any contract required by clause 16 of the Schedule to this Act to be stated in the prospectus or, in the case of a contract not reduced into writing, a memorandum giving full particulars thereof, and
- (c) where the persons making any report required by Part II of that Schedule have made therein or have, without giving the reasons, indicated therein any such adjustments as are mentioned in clause 34 of that Schedule, a written statement signed by those persons setting out the adjustments and giving the reasons therefor

(2) The reference in paragraph (b) of the foregoing sub-section to the copy of a contract required thereby to

be endorsed on c1 attached to a copy of the prospectus shall, in the case of a contract wholly or partly in a foreign language, be taken as references to a copy of a translation of the contract in English or a copy embodying a translation in English of the parts in a foreign language, as the case may be, being a translation certified in the prescribed manner to be a correct translation

Penalty for
contraven-
tion of three
foregoing
sections

277E 8 Any person who is knowingly responsible for the issue, circulation or distribution of a prospectus, or for the issue of a form of application for shares or debentures, in contravention of any of the provisions of the three last foregoing sections shall be liable to imprisonment for a period not exceeding six months or a fine not exceeding five thousand rupees or both

Civil liab-
ility for mis-
statements
in prospec-
tus

277E 9 Sections 97 and 107 of this Act shall extend to every prospectus offering for subscription shares in or debentures of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, with the substitution, for references in section 97 to section 94 of this Act, of references to section 277E6 thereof

Interpreta-
tion of pro-
visions as to
prospectuses

277E 10 (1) Where any document by which any shares in or debentures of a company incorporated outside India are offered for sale to the public would, if the company concerned had been a company within the meaning of this Act, have been deemed by virtue of section 100 of this Act, to be a prospectus issued by the company, that document shall be deemed to be, for the purpose of this Part of this Act, a prospectus issued by the company offering for subscription such shares or debentures

(2) An offer of shares or debentures for subscription or sale to any person whose ordinary business it is to buy or sell shares or debentures, whether as principal or agent, shall not be deemed an offer to the public for the purposes of this Part of this Act

(3) In this Part of this Act the expressions "prospectus", "shares" and "debentures" have the same meanings as when used in relation to a company incorporated under this Act

28 REDRAFT OF SECTION 278

(Page 335 of the Annexure and paragraphs 203 and 233 of the Report)

278 (1) No prosecution shall lie against any company ^{Cognisance} or against any officer thereof for any offence against this ^{of offences} Act, other than an offence against section 237, save and except on the complaint in writing of the Registrar or of a shareholder of the company, or of the Central Authority

Provided that nothing in this sub-section shall apply to any action taken by the liquidator of a company in respect of any offence committed in respect of any of the matters included in Part VI of the Act

(2) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence against this Act

(3) If any offence which by this Act is punishable by fine only is committed by any person within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, such offence shall be punishable upon summary conviction by any Presidency Magistrate of the place at which such Court is held

(4) Notwithstanding anything in the Code of Criminal Procedure, 1898 (V of 1898) every offence against this Act, shall, for the purposes of the said Code, be deemed to be non-cognisable

(5) If in any case instituted upon the complaint of a shareholder, one or more persons is or are accused before a Magistrate of an offence against this Act and the Magistrate by whom the case is heard discharges or acquits all or any of the accused and is of opinion that the accusation against them or any of them was frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or any of such accused when there are more than one, or, if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid

• (6) The Magistrate shall record and consider any cause which such complainant may show and if he is satisfied that the accusation was frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount, as he may determine be paid by such complainant to the accused or to each or any of them, not exceeding five thousand rupees in all

(7) The Magistrate may, by the order directing payment of the compensation under sub-section (6), further order that, in default of payment the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding six months

(8) When any person is imprisoned under sub-section (7) the provisions of sections 68 and 69 of the Indian Penal Code shall so far as may be, apply

(9) No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made by him

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter

(10) A complainant who has been ordered under sub-section (5) by a Magistrate to pay compensation may appeal from the order in so far as the order relates to the payment of compensation, as if such complainant had been convicted on a trial by such Magistrate

(11) Where an order for payment of compensation to an accused person is made, the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided

APPENDICES.

APPENDIX I

[Paragraph 7 of the Report]

List of Witnesses Examined by the Company Law Committee

<i>Place</i>	<i>Date</i>	<i>Witnesses examined</i>
MADRAS	27-1-51	1 MADRAS CHAMBER OF COMMERCE 1 Mr J S Goodwin, A C A 2 Mr D S Woolf, O B E , A C A. 2 INSPECTOR-GENERAL AND REGISTRAR OF JOINT STOCK COMPANIES 1 Mr H Krishnamurty 3 SOUTHERN INDIA CHAMBER OF COMMERCE 1 Rao Bahadur R B V S Subramaniam 2 Mr A M M Murugappa Chettiar 3 Mr S Ramaswamy Naidu 4 Mr S Narayanaswamy 5 Mr K V Srinivasan 6 Mr B M Kumbhat
	28-1-51	4 MADRAS STOCK EXCHANGE 1 Mr J V Somayajulu 2 Mr S N B Eswaran 3 Mr V Rangachari 4 Mr S Narayanaswami 5 MR C M SRINIVASAN 6 HINDUSTAN CHAMBER OF COMMERCE 1 Mr D C Kothari 2 Mr J J Patel 3 Mr Janti Lal 4 Mr D Srinivasan 7 BAR COUNCIL 1 Mr B V Viswanatha Ayyar 2 Mr C A Vaidyalingam
	29-1-51	8 ANDHRA CHAMBER OF COMMERCE 1 Mr Guntur Narasimha Rao 2 Mr P Suryanarayana 3 Mr J Satyanarayana
BANGALORE	30-1-51	9 MYSORE CHAMBER OF COMMERCE 1 Mr B K Ramadhyani 2 Mr A Krishnamurti

<i>Place</i>	<i>Date</i>	<i>Witnesses examined</i>
BANGALORE— <i>contd</i>		3 Mr V G Rudrappa. 4 Mr S P Ogale 5 Mr S S Shrinivasan 6 Mr G M Krishnamurti
BOMBAY	8 2-51	10 BOMBAY CHAMBER OF COMMERCE 1 Mr L F H Goodwin, O B E 2 Mr L A Halsall, C B E 3 Mr A E Blair 4 Mr Kishore M Premchand 5 Mr F A Cole 11 AHMEDABAD MILLOWNERS' ASSOCIATION 1 Mr Chandulal P Parikh 2 Mr Nanddas Haridas 3 Mr Sakarlal Balabhai 4 Mr Shantilal Mangaldas 9-2-51 12 OFFICIAL LIQUIDATOR Mr R Mithalone 13 ALL INDIA MANUFACTURERS' ORGANISATION 1 Dr L C Jariwala 2 Mr Murari J Vaidya. 3 Mr S N Haji 4 Mr N S Pochkhanwala 5 Mr F R Moos 6 Mr Sankalchand G Shah 10-2-51 14 MAHRATTA CHAMBER OF COMMERCE 1 Mr S L Kirloskar 2 Mr G R Sathe 3 Mr G D Apte 4 Mr A R Bhat 5 Mr D B Kerur 12-2-51 15 REGISTRAR OF JOINT STOCK COMPANIES Mr Beharamji M Modi, F S A A 16 BOMBAY GOVERNMENT Mr J K Thakore, Deputy Secretary, Finance Ministry 17 HIND MAZDOOR SABHA Mr G G Mehta 13-2-51 18 MAHARASHTRA CHAMBER OF COMMERCE 1 Mr L S Dabholkar

1946
BOMBAY— *contd*

Date

Witnesses examined

2 Mr G S Joshi

3 D V Kelkar

19 INCORPORATED LAW SOCIETY

1 Mr N H Sethna

2 Mr M B Madgavkar

3 Mr Damodardas Mehta

13-2 51 20 INDIAN BANKS ASSOCIATION

1 Mr R G Saraiya

2 Mr N Bhattacharj

3 Mr S G Panandikar

14-2 51 21 BOMBAY STOCK EXCHANGE

1 Mr K R P Shroff

2 Mr P D Jeejeebhoy

22 INDIAN MERCHANTS' CHAMBER

1 Mr Madanmohan R Ruia

2 Mr R G Saraiya

3 Mr Mangaldas B Mehta

4 Mr Dinshaw K Daji

5 Mr A C Ramalingam

15-2 51 23 TATA INDUSTRIES

1 Mr J D Choksi

2 Mr N D Davar

15 2 51 24 BOMBAY MILLOWNERS' ASSOCIATION

1 Mr Dharamsi M Khatau

2 Mr Krishnaraj M D Thackersay

3 Mr G D Somani

4 Mr N S V Aiyar

16-2 51 25 MADHYA PRADESH MILLOWNERS' ASSOCIATION

1 Mr Kushal Chand Daga

2 Mr Daulat Jada

3 P Srinivasan

CALCUTTA

15-3-51 26 BENGAL CHAMBER OF COMMERCE

1 Mr A R Elliot Lockhart, C I E

2 Mr Paul Benthall, K B E

3 Mr G R Crooks, M B E, A C A, R A

4 Mr R A Brown, C A, R A

5 Mr H C Waters, O B E

6 Mr C J T Palmer

27 BENGAL MILLOWNERS' ASSOCIATION

1 Mr S C Roy

2 Mr S Bhattacharjee

3 Mr D N Bhattacharjee

<i>Place</i>	<i>Date</i>	<i>Witnesses examined</i>
CALCUTTA— <i>contd</i>	16 3 51	28 INDIAN CHAMBER OF COMMERCE 1 Mr L N Birla 2 Mr B P Khaitan 3 Mr K N Gutgutia
		29 INCORPORATED LAW SOCIETY 1 Mr Satyendranath Sen 2 Mr Barendra Prosad Roy.
	17-3-51	30 BENGAL NATIONAL CHAMBER OF COMMERCE 1 Dr N N Law 2 Mr J K Mitter 3 Mr D N Sen 4 Mr P N Talukdar 5 Dr S B Datta 6 Mr G Basu 7 Mr J N Sen Gupta 8 Mr S C Roy
		31 EDITOR, INDIAN FINANCE Mr C S Rangaswami
	19-3-51	32 CALCUTTA STOCK EXCHANGE 1 Mr B N Chaturvedi 2 Mr C N Jhunhunwala 3 Mr Bangar
		33 BHARAT CHAMBER OF COMMERCE. 1 Mr I P Goenka 2 Lala Lakshmipat Singhanla 3 Mr K L Dhandhanla 4 Mr B D Jhunhunwala 5 Mr R Singhi
	20-3-51	34 DIRECTOR OF INDUSTRIES Mr D N Ghose
		35 REGISTRAR OF JOINT STOCK COMPANIES, WEST BENGAL Mr B P Roy
		36 REGISTRAR OF JOINT STOCK COMPANIES, ASSAM Mr A N M Saleh
		37 REGISTRAR OF JOINT STOCK COMPANIES, BIHAR Mr A Prasad
	21-3-51	38 SIR BIREN MOOKERJEE

<i>Place</i>	<i>Date</i>	<i>Witnesses examined</i>
CALCUTTA— <i>contd.</i>	21-3-51	39. ALL INDIA INVESTORS ASSOCIATION. 1 Mr M K Deb 2 Mr R M Seal 3 Mr G M Basu 4 Mr H C Chatterji
NEW DELHI	26-4-51	40 INDIAN NATIONAL TRADE UNION CONGRESS 1 Mr Shantilal H Shah 2 Mr S P Dave 41 DEPUTY REGISTRAR OF CO-OPERATIVE SOCIETIES, U P Mr M S Misra
	27-4-51	42 FEDERATION OF INDIAN CHAMBERS OF COMMERCE AND INDUSTRY 1 Mr C M Kothari 2 Mr S P Jam 3 Mr B K Daphtary 4 Mr Shantilal Mangaldas 5 Mr G L Bansal 43 SIR SHRI RAM
	28 4 51	44 KANPUR STOCK EXCHANGE 1 Shri S L Chopra 45 INDIAN CHAMBER OF COMMERCE, AMBALA 1 Dr D R Narang 2. Mr H S Balhaya 3 Mr P S Sodhbans 46 CENTRAL BOARD OF REVENUE 1 Mr Pearey Lal Uppal 2 Mr S A L Narayana Rao
	29-4-51	47 INDUSTRIAL FINANCE CORPORATION Mr Ramnath 48 MERCHANTS' CHAMBER OF U P KANPUR 1 Lala Parshotam Das Singhania 2 Mr P D Chandarana 3 Mr J V Krishnan

APPENDIX II—*contd*

STATEMENT No C-1

National income of the Indian Union by the industrial origin 1948-49

(Data compiled by the National Income Unit)

Item	Net output (Rs abja*)	Per- centage
1	2	3
<i>Agriculture—</i>		
1 Agriculture, animal husbandry and ancillary activities ¹	40 7	46 7
2 Forestry	0 6	0 7
3 Fishery	0 2	0 2
4 Total of agriculture	41 5	47 6
<i>Mining, Manufacturing and Hand Trades—</i>		
5 Mining	0 6	0 7
6 Factory establishments	5 8	6 6
7 Small enterprises	8 6	9 9
8 Total of mining, manufacturing and hand trades	15 0	17 2
<i>Commerce, transport and communication—</i>		
9 Communications (post, telegraph and tele- phone)	0 3	0 3
10 Railways	2 0	2 3
11 Organized banking and insurance	0 5	0 6
12 Other commerce and transport ²	14 2	16 3
13 Total of commerce, transport and communi- cations	17 0	19 5
<i>Other Services—</i>		
14 Professions and liberal arts	3 2	3 7
15 Government services (administration)	4 6	5 3
16 Domestic service	1 5	1 7
17 House property	4 5	5 2
18 Total of other services	13 8	15 9

APPENDIX II—*contd*STATEMENT No C-1—*contd*

	1	2	3
19 Net domestic product at factory cost	87 3	100 2	
20 Net earned income from abroad	(—) 0 2	(—) 0 2	
21 Net national ouptput at factor cost national income	87 1	100 0	

* abja=100 crores=1 milliard=1 U S billion=10⁹

Rs abja=75 million pounds sterling =210 million U S dollars (current rate)

¹ These include processing, marketing and ancillary activities performed by the ultivator in respect of his own produce

² Include services of indigenous money lenders

NOTE—See the remarks in the footnote to statement No C²

APPENDIX II—*contd*

STATEMENT No C-2

*Net domestic product of the Indian Union by character of enterprise,
1948-49*

Item	Net output (Rs abia*)	Percentage of	
		"classified product"	"domestic product"
1	2	3	4
<i>Small enterprises (largely household)—</i>			
1 Agriculture (other than plantations, etc)	40 0	62 6	
2 Fishery	0 2	0 3	
3 Small enterprises and hand-trades	8 6	13 4	
4 Professions and liberal arts	3 2	5 0	
5 Domestic service	1 5	2 3	
6 Total of small enterprises	53 5	83 6	61 3
<i>Larger enterprises</i>			
7 Agriculture (plantations, etc)	0 7	1 1	
8 Forestry	0 6	0 9	
9 Mining	0 6	0 9	
10 Factory establishments	5 8	9 1	
11 Railways	2 0	3 1	
12 Communications	0 3	0 5	
13 Organised banking and insurance	0 5	0 8	
14 Total of larger enterprises	10 5	16 4	12 0
<i>Unclassified Items—</i>			
15 Other commerce and transport	14 2		
16 Government services (administration)	4 6		
17 House property	4 5		
18 Total of unclassified items	23 3		26 7
19 Net domestic product	87 3	100 0	100 0

APPENDIX II—*contd*STATEMENT No C-2—*contd*

*abja=100 crores=1 milliard=1 U S billion=10⁹

Rs abja=75 million pounds sterling=210 million U S dollars

NOTE —The information given in Statement No C 1 has been regrouped in Statement No C 2. In the latter statement items 15 to 17 (namely, other commerce and transport, government administration and house property) have not been classified. The remaining items have been grouped under 2 heads —

(a) small (or broadly household) enterprise,
and

(b) larger enterprises (which are generally corporate establishments)

2 It is, however, difficult to form any precise idea of the contribution of Joint Stock Companies as such to the total national income of the country from these two tables. The National Income Unit have arrived at these estimates by a combination of the "inventory" and the "income" methods without in any way taking into consideration the types of organisation in the individual sectors of the economy. A rough approximation may perhaps be possible by making the following assumptions —

The total net output value in the case of tea, coffee and rubber, mining, factory
• • establishments and organized banking and insurance, and one half of the net
output value in the case of item 13 in Statement No C-1, *i.e.*, "other commerce
and transport" may be assigned to this group (Joint Stock Companies)

On this approximation the share of Joint Stock Companies in the total national income of the Indian Union works out at about Rs 1,500 crores (or 17 per cent of the net domestic product at factor cost) comprising —

	Rs Crores
(a) tea plantations	60 1
(b) coffee plantations	5 2
(c) rubber plantations	2 6
(d) mining	60 0
(e) factory establishment	580 0
(f) organised banking and insurance	50•0
(g) other commerce and transport	710 0
TOTAL . .	1467 9

APPENDIX II—*contd*

STATEMENT No E

*Relative importance of private and public forms of Joint Stock Companies
in India*

	1916-17	1919-20	1938-39	1945-46
I All Companies—				
No	2,513	3,668	11,114	17,843
Paid-up Capital (Rs Crores)	91	123	290	424
II Public Companies—				
No	2,306	3,000	6,859	10,129
Paid-up Capital (Rs Crores)	85	105	213	323
III Private Companies—				
No	207	668	4,255	7,214
Paid up Capital (Rs Crores)	6	18	77	101
Per cent of Total—				
IV Public Companies—				
No	91 8	81 8	61 7	58 4
Paid-up Capital	93 6	84 9	73 4	76 2
V Private Companies—				
No	8 2	18 2	38 3	41 6
Paid-up Capital	6 4	15 1	26 6	23 8

NOTE

This statement is based on the data furnished in the alphabetical list of companies appended to the annual publication relating to the Joint Stock Companies in British India and in certain Indian States.

2 The figures relating to paid up capital are not necessarily complete in all cases as they are based only on such information as is available to the Registrars of Joint Stock Companies upto the end of the financial year concerned. Besides, companies limited by guarantee and unlimited companies may or may not have a share capital. While the latter are included in the aggregate figures relating to the total number of companies, the corresponding figures of paid up capital do not include such companies. A similar qualification is necessary in the case of companies formed for the purpose of promoting commerce, art, science, religion, charity, etc., such as Chamber of Commerce, Social Clubs or Learned Societies and similar institutions.

3 Comparable figures for the years prior to 1916-17 and later than 1945-46 cannot be furnished as the primary data required for their computation have not been included in the statistical publications relating to these years.

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APPENDIX III
(Paragraph 24 of the Report)
No 4(25)-CLEC/50-51

GOVERNMENT OF INDIA

MINISTRY OF FINANCE
COMPANY LAW COMMITTEE

Administrative Intelligence Room,
Queensway, New Delhi, the 4th/6th August, 1951.

From.

SHRI D L MAZUMDAR, M A, I C S,
Member-Secretary

To

The Secretary to the Government of India,
Department of Economic Affairs,
Ministry of Finance,
New Delhi

SIR,

I am directed to convey to you the comments of the Company Law Committee on the Indian Companies (Amendment) Ordinance 1951, which was promulgated on the 21st July, 1951. The Committee was requested by Government to examine the Ordinance, and, as desired by the latter, a special meeting of the Committee was held in Calcutta on the 30th July. The views expressed by the Committee at this meeting are embodied in the enclosed memorandum.

2 In authorising the undersigned to communicate its views to Government, the Committee desired that the following points should be brought specifically to their notice —

(1) The provisions of the Ordinance cover several major issues of policy, which have been under the consideration of the Committee for sometime past. The Committee has not yet formulated its final views on them and the comments made by it on the provisions of the Ordinance are, therefore, necessarily subject to such views as it may express at a later date in its report, when it has been able to formulate its recommendations on these and other major issues of policy relating to the amendment of the Indian Companies Act. The views expressed by the Committee on the present occasion are, therefore, without prejudice to its final recommendations on these and allied issues.

(2) Although the Committee's views on the subject are thus necessarily provisional to the extent indicated above, the

Committee is in full agreement with the objects underlying the Ordinance, and in the light of the evidence adduced before it is inclined to think that a *prima facie* case has been made out for controlling the activities of undesirable elements in trade and industry in the interests of investors, the general public and the companies themselves

(3) The Committee attaches the greatest importance to the effective and vigorous administration of the Ordinance, for, in the absence of such administration its provisions will be rendered largely nugatory. The Committee trusts that the Commission, which has already been set up to advise and assist the Central Government in this matter, will be adequately equipped to enable it to discharge its duties efficiently and expeditiously. To this end, the Committee has proposed some enlargement of the functions and powers of the Commission ..

(4) With regard to the new Sections 153C and 153D, which have been inserted by Clause 7 of the Ordinance, the Committee notes that, in essentials, the clause is based on the provisions of Section 210 of the English Companies Act, 1948. The absence in the Indian Companies Act of the powers of inspection and investigation similar to those conferred on the UK Board of Trade under Sections 164 to 175 of the English Companies Act, 1948, may, however, somewhat impair the efficacy of these new Sections, but the Committee trusts that the amendments which it has suggested in this Clause and in Clause 8 of the Ordinance, relating to the functions and powers of the Advisory Commission, will go some way towards making good this deficiency in the Indian law. From this point of view, the Committee would emphasize that the machinery of the Commission should be utilized not merely for advising the Central Government on all applications for approval made to it under Clauses 2, 3, 4, 5 and 6 of the Ordinance, but also in respect of all other matters that may arise out of the Ordinance and in respect of which Government may need its advice

3 I am to add that Shri M. L. Shah, a member of the Committee, does not subscribe to the view of the other members that sub-section (1) of the new Section 153C should apply retrospectively to companies with effect from the 1st December 1949

Yours faithfully,

(Sd) D. L. MAZUMDAR,

Member-Secretary.

*Memorandum embodying the views of the Company Law Committee
on the provisions of Ordinance III of 1951*

[The references to the clauses and clause headings in this Note are the same as in the Ordinance]

Clause 2—Insertion of new section 86J in Act VII of 1913—This clause does not prevent the directors or shareholders of a company, where so empowered by its articles, from increasing the number of directors even beyond the maximum number specified in the articles and thereby from indirectly getting round its provisions. Nor does this clause specifically prohibit an increase in the remuneration of a managing director or director not liable to retirement except with the approval of the Central Government. Hence it is suggested that the following additional provisions should be incorporated in this clause —

- (i) Any resolution increasing the number of directors of a company should be rendered void, unless approved by the Central Government, except when under the articles of a company, a maximum number of directors has been prescribed and the number of existing directors falls short of that maximum and the resultant vacancies can be filled
- (ii) Any change in the terms and conditions of appointment of a managing director or a director not liable to retirement made without the prior approval of the Central Government shall be void

[Cf clause 6(b) which similarly prohibits any increase in the remuneration of a managing agent, a managing director or a director not liable to retirement by rotation in the case of companies managed by managing agents]

Clause 3—Insertion of new section 87AA in Act VII of 1913—The clause as drafted does not prevent the shareholders from passing any resolution extending the term of office of a managing agent. The clause should therefore be amended by adding the following words after the word “company” in the second line —

“or any resolution”

Clause 4—Amendment of section 87B, Act VII of 1913—This clause prevents the transfer of the office of a managing agent, but does not prevent the resignation of an existing managing agent and the subsequent appointment of a new managing agent under a collusive arrangement between the two parties. Nor is there any provision in the Ordinance for the prior approval of the Central Government to the appointment of a new managing agent for an existing company, where the old managing agents have been replaced by a new managing agent by share-cornerers who have acquired a majority interest in the company. To meet such cases, it is necessary to prohibit the appointment of a new managing agent in the case of a company existing at the date of the Ordinance, except with the prior approval of the Central Government.

Clause 5—Insertion of new section 87BB in Act VII of 1913—
 This clause prohibits changes in the constitution of a managing agency firm or company, whether brought about by changes in the ownership of shares or by a change in its partners, directors or managers, except with the prior approval of the Central Government. As the clause is worded at present, it is possible to argue that any change in the shareholding of a managing agency company, however small or inconsequential it may be, affects its constitution and should, therefore, require the prior approval of the Central Government. This was obviously not the intention of Government. Nor would it appear to have been their intention to restrict *bona fide* dealings in the shares of public limited managing agency companies the shares of which are quoted and freely dealt in on the Stock Exchanges. Further, even if it were intended to bring all changes in the shareholding of a managing agency company within the purview of this clause, it would be extremely difficult if not impossible to give effect to any such provision. The difficulty will greatly increase in the case of managing agencies which are public limited companies. For all these reasons, it is necessary that this clause should be amended on the following lines —

- (1) For the words “whether the change is caused by a change in the ownership of the shares held therein”, the following words should be substituted—

“whether the change is caused by a change in the *registered* ownership of the shares held therein”

- (2) Managing Agency Companies, which are public limited companies and the shares of which are quoted and dealt in on a recognised Stock Exchange should be partially exempt from the operation of the clause, so that changes in the holding of shares in them may not be deemed to cause a change in their constitution. The Central Government should, however, have the power to withdraw or to vary the terms of this exemption in particular cases.
- (3) The conversion of a private company into a public limited company, permitted under section 154 of the Indian Companies Act, should be deemed to constitute a change in the constitution of a managing agency company and should be brought within the purview of this clause.
- (4) Subject to the above amendments, this clause should apply to all managing agency firms or companies.
- (5) The scope of the explanation given under this clause should be widened so as to provide that changes in the shareholding of a managing agency company or among the partners, directors or managers of a managing agency firm or company caused by the removal of a managing agent do not constitute a change in the constitution of the managing agent.
- (6) As different views have been expressed on the legal consequences of transfers of shares in managing agency companies however small their number, which may

follow from the terms of this clause read with the explanation attached to it, it may be desirable to place the issue beyond doubt by the insertion of a validating sub-clause to the effect that nothing in the present clause would be deemed to have affected or to affect the validity of any transfer of shares in a managing agency company made since the promulgation of the Ordinance unless such transfer altered or would alter the controlling interest of the existing managing agent in the company

Clause 6—Insertion of new section 87CC in Act VII of 1913—No comments

Clause 7—Insertion of new sections 153C and 153D in Act VII of 1913—(1) It is considered desirable that section 153C should take effect from the 1st December, 1949, the date by which the memorandum on the amendment of the Indian Companies Act was made available to the general public

(2) The word "member" in the first line of sub-clause (2)(a) should be changed into "member or members" The intention is that one or more members of a company who between them hold at least one-tenth of the share capital of a company, should be in a position to apply to Court under this provision

(3) It is considered necessary that the provisions relating to discovery and inspection in Order I of the Civil Procedure Code should apply to applications made under the new section 153C, so that it may be possible for the petitioners to invoke these powers in order to ascertain the facts necessary for supporting their allegations

(4) It is considered desirable that suits under the new sections 153C and 153D should be triable exclusively in the High Courts

(5) It should be clearly provided in the sub-section (3) of the new section 153D that an opportunity is given to Government to appear before the Court

(6) The definition of an "associate of a managing agent" given in the new section 153D requires tightening up and may be amplified on the following lines —

(a) Clause (c) of this definition may be modified as follows

"Any private company of which the managing agent or any partner of the managing agent or any officer of the managing agent (where the managing agent is a private company), as a member director, managing agent or manager"

(b) the following *additional* clauses may be inserted under this definition —

(i) where the managing agent is a private company, any director or member thereof,

(ii) any company at any general meeting of which the managing agent, either alone or together with any partner of the managing agent, and (where the managing agent is a company) any director of the managing agent is entitled to exercise or control the exercise of one quarter or more of the voting power

Clause 8—Insertion of new Section 289B in Act VII of 1913

(1) The Commission's duty should be confined not merely to the tendering of advice on the applications for approval made to the Central Government under clauses 2, 3, 4, 5, and 6 of the Ordinance, but should also extend to the tendering of advice in respect of any other matter, arising out of the Ordinance that may be referred to it. Sub-clause (2) of clause 8 may be amended accordingly

(2) Before any application for approval is made to the Central Government under any of the clauses 2, 3, 4, 5 and 6 of the Ordinance, a general notice to shareholders indicating the nature of the approval sought should be published once in an English and once in a vernacular newspaper published at or near the registered office of the company, and copies of the advertisement, duly certified by the company, should be attached to the application made to the Central Government

[This provision should not however apply to a private company, which is not the managing agent of a public company] ..

(3) The Commission should have power in special cases to issue notices on such persons as it thinks fit to appear before it in person or by agents and to direct them to supply such information or to produce such books or accounts as it may require for the purposes of its enquiry

(4) The Commission should have the right to examine on oath not merely a managing director or an officer of the company, but also any other person it considers necessary, including any shareholder

Miscellaneous—A suitable penal clause should be inserted for any contravention of the provisions of the Ordinance where such contravention has been committed knowingly and wilfully

APPENDIX IV

(Paragraph 147 of the Report)

A note on the evolution of the Accounts and Audit provisions in the Companies Acts of England and India

[As has been already observed in paragraph 147 of the Report, the provisions of the Indian Companies Act, particularly those introduced by the Amendment Act of 1936, in regard to the accounts and audit of joint stock companies have been in advance of corresponding provisions of the company law in the United Kingdom. Since in many other respects, our Act has been modelled on the pattern of the United Kingdom legislation, it may be useful to compare the evolution of the accounts and audit provisions in the Companies Acts of the two countries.]

1. There were no provisions about accounts and audit in the English Act of 1862, but the articles of association of companies normally contained some provisions on this subject, which were usually those contained in the optional regulations 78 to 94 of Table 'A'. These provisions required the maintenance of the true accounts of the stock-in-trade of the company and the sums received and expended by it, of the matters in respect of which such receipt and expenditure took place and of the credits and liabilities of the company. Regulation 80 of the English Act of 1862 was similar to regulation 107 of Table 'A' of the present Indian Companies Act. As regards the balance sheet, it required a summary of the property and liabilities of the company, arranged in the form annexed to the Table or as near thereto as circumstances permitted. The form of the balance sheet included very few items and the information required to be disclosed was also limited.

2. The provisions relating to auditors, which were contained in regulations 83 to 94, permitted members of the company to be its auditors, but no person was eligible to become an auditor if he was interested otherwise than as a member in any transaction of the company. No director or other officer of the company was so eligible during his continuance in office. It is also worth mentioning that under regulation 90, a casual vacancy could not be filled by the directors themselves, but they were required forthwith to call an extraordinary general meeting for this purpose. It is equally interesting to note that under regulation 93, the auditor had the option of employing accountants and other persons to assist him in investigating the accounts of the company at its expense. He was also given the power, in relation to such accounts, to examine the directors or any other officer of the company.

3. In their report on the balance sheet and accounts of the company, the auditors were enjoined to state whether in their opinion the balance sheet was a full and fair document containing the particulars required to be included in it by these regulations and whether it was properly drawn up, so as to exhibit a true and correct view of the state of the company's affairs. In case they

had called for any explanation or information from the directors, the auditors were to state whether such explanation or information had been given by the directors and whether they were satisfactory. The auditors' report had to be read together with the report of the directors at the ordinary meeting. These requirements were without prejudice to any other provisions contained in the articles of the company.

4 By the English Companies Act of 1900, additional requirements were introduced in the substantive provisions of the law as to the audit of companies. These provisions were supplementary to, and not in substitution of, the provisions as to the audit contained in the Companies Act, 1879, which referred to audit of banking companies. The inclusion of the audit provisions in the statute resulted in considerable modification of the relevant regulations in Table 'A' inasmuch as the right of filling a casual vacancy in the office of auditors was vested in the directors themselves instead of in the shareholders at an extraordinary general meeting. Further, the auditors were required to endorse a certificate at the foot of the balance sheet, stating whether or not all their requirements as auditors had been complied with and to make a report to the shareholders on the accounts examined by them. They had also to state in the report whether, in their opinion, the balance sheet was properly drawn up so as to exhibit a true and correct view of the state of the company's affairs as shown by the books of the company. The report had to be read before the company in general meeting.

5 The Indian counterpart of the United Kingdom Act of 1862 was the Indian Companies Act of 1882, which closely resembled its prototype. It is, however, worth mention that section 74 of the Indian Act contained specific provisions about the balance sheet to be made out by every company and filed with the Registrar of Joint Stock Companies within twelve months from the date of registration of a company and thereafter at least once in every year within twelve months from the filing of the balance sheet immediately preceding. Such a balance sheet had to contain a summary of the property and liabilities of the company prepared in the form annexed to Table 'A' in the First Schedule to the Act or as near thereto as circumstances admitted. The earlier provision in this respect was contained in the Indian Companies Act, 1866, which made an annual examination of the company's accounts and the preparation and filing of an annual balance sheet compulsory. The provisions of Table 'A' relating to accounts and audit under the Indian Act of 1882 were contained in clauses 78 to 94 which were a *verbatim* reproduction of the relevant clauses of Table 'A' of the English Act of 1862. The form of the balance sheet annexed as the First Schedule to Table 'A' was also a *verbatim* reproduction of the relevant schedule in the English Act.

6 The Companies Consolidation Act, 1908, of the United Kingdom consolidated into one Act the provisions contained in the Companies Acts passed between 1862 and 1908. Practically the entire statute law relating to limited companies was embodied in it. The provisions with regard to audit were contained in sections 112 and 113 of the Act. Important changes brought about by these provisions were that every auditor was given the right of access at all

times to the books and accounts and vouchers of the company, and the right to demand from the directors and the officers of the company such information and explanation as he considered necessary for the discharge of his duties as auditor. He was also required to report on every balance sheet whether or not he had obtained all the information and explanation which he had demanded, and whether in his opinion the balance sheet was properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of his information and the explanations given to him and as shown by the books of the company. The other requirements about the signing of the balance sheet and its circulation with the auditors' report and the usual exemption relating to the audit of the branch accounts were also retained. This was the usual provision to the effect that where a banking company had branch banks beyond the limits of Europe, it would be sufficient if the auditor was given access to such copies or extracts of the books of the branches as might have been submitted to the head office of the banking company in the United Kingdom.

7 As regards the appointment of auditors, very important changes were introduced by the Act of 1908. Section 112 provided for the auditors being appointed at each annual general meeting to hold office until the next annual general meeting. Power was given to the Board of Trade to appoint an auditor, where no appointment had been made by the company. A director or officer of the company was prohibited from being appointed as its auditor. A person other than a retiring auditor was not eligible, unless notice of intention to nominate such a person had been given by the shareholders to the company not less than fourteen days before the annual general meeting. The company was placed under an obligation to send a copy of such notice to the retiring auditor as well as to the members of the company. The power to fill in a casual vacancy, however, continued to be vested in the directors.

8 The provisions in Table 'A' of the previous Act with regard to accounts and audit were incorporated in regulations 103 to 109 of Table 'A' appended to the Companies Consolidation Act, 1908. It is to be noted that the regulation with regard to audit, viz, regulation 109 simply recited the provisions of the Act itself, while some detailed provisions were made with regard to accounts. They had to exhibit a true account of the sums received and expended by the company together with the matters in respect of which such receipts and expenditure took place and of the assets and liabilities of the company. There was a further provision about laying before the company in a general meeting a profit and loss account for the period subsequent to that of the preceding account or, in the case of the first account, since the incorporation of the company made up to a date not more than six months before such meeting. This provision was contained in regulation 106.

9 The corresponding Indian legislation is to be found in the Indian Companies Act of 1913. The object of this enactment was to revise and consolidate the Indian law on the subject of joint stock companies on the lines of the contemporary English legislation. The Act of 1913 had replaced the Indian Companies Act of 1882 and the subsequent amending Acts of the years 1887, 1900 and 1910,

The substantial additions which were made to the English law between 1879 and 1908 were, however, not, except for the matters dealt with by the small amending Acts, adopted in the Indian law. Among the new and important provisions introduced were those regarding the appointment, remuneration and duties of auditors. Sections 144 and 145 of the Indian Companies Act, 1913, prescribed the qualifications for appointment of and the powers and duties of auditors. It is significant that as against the provisions of sub-section (3) of section 112 of the English Companies Consolidation Act, 1908, whereby a director or officer of the company was prohibited from being appointed an auditor of the company, several other prohibitions were introduced in the Indian Act so that a partner of such director or officer was debarred from being appointed an auditor of the company. In the case of a company other than a private company, any person who was in the employment of such director or officer was also ineligible for such appointment.

10 As to the contents of the auditor's report, the provisions were more or less similar to those of the English Act, except that there was an additional requirement to state whether in the opinion of the auditors, the balance sheet referred to in the report was drawn up in conformity with the law.

11 A very material departure from the English practice was the provision contained in section 132 of the Indian Companies Act, 1913, which required that the balance sheet should contain a summary of the property and assets and of the capital and liabilities of the company, giving such particulars as would disclose the general nature of those liabilities and assets and how the value of the fixed assets had been arrived at. The Indian Act made a clear stipulation that the balance sheet should be in the form marked 'F' in the Third Schedule or as near thereto as circumstances permitted. This was certainly an advance upon the position obtaining under the English Act of 1908, and it is generally accepted that the reform has been in the best interest of the investing public.

12 The next phase of amendment came with the English Companies Act, 1929, which was the result of the labours of the Green Committee. A radical change was made by this Act in the provisions relating to accounts and the auditor's responsibilities. The accounts and audit provisions were contained in sections 122 to 134 of the Act. They very clearly provided for the keeping of the books of account, for the laying of the profit and loss account and the balance sheet before the company in general meeting and for the contents of the balance sheet. Under section 124, every balance sheet of a company was to contain a summary of its authorised share capital and of its issued share capital, its liabilities and its assets together with such particulars as would be necessary to disclose the general nature of the liabilities and assets and to distinguish between the amounts respectively of the fixed assets and of the floating assets and should state how the value of each asset was determined. It was also necessary to show separately preliminary expenses and expenses incurred in connection with the issue of share capital or debentures, if not written off.

13. It is important to note that the Green Committee was opposed to the adoption of any standard form of accounts and balance sheet as in the case of railways, assurance and banking companies, but

new and stringent provisions as to information which must be disclosed in the balance sheets, with further requirements in the case of holding companies relating to aggregate profits and losses of subsidiaries were introduced. Although after the 1929 Act came into force many companies issued balance sheets containing all such information as could be safely disclosed to their members, the practice of others was very different. It was apparently the public dissatisfaction with this state of affairs which made it necessary to consider whether standard requirements should not be laid down which companies would be bound to follow. It is a matter of experience, however, that companies which had been in the habit of keeping the shareholders in the dark continued to do so, while endeavouring always to remain within the letter of the law.

14 Section 134(3) of the English Act of 1929 gave the auditors the right to attend meetings and submit explanation in support of their statements. It may be interesting to note in this connection that, although the well-known City Equitable Case drew pointed attention to the position of auditors, the Committee declined to make any attempt to regulate their duties by statute. As regards indemnity, the auditors were placed in the same position as directors. Although, as a rule, only qualified accountants were being appointed, the Legislature in England was consistently reluctant to recognise any particular body of accountants or indeed any special qualifications. It may also be noted that the rights of attendance granted to the auditors were restricted to attendance at meetings where matters relating to accounts were to be discussed. Thus, they had no right to attend any other meeting although the matters discussed might be those relating to their own appointment or their own office.

15 After the passing of the English Companies Act, 1929, demands were made for a thorough overhaul of the Indian Act which was based upon the earlier English Act of 1908. The Government of India, from time to time, promised to take up the question at their earliest convenience, but on account of their pre-occupation with constitutional changes culminating in the enactment of the Government of India Act 1935, the matter could not be taken up for consideration till 1934. In that year a Special Officer was appointed to examine the entire question and to make suggestions for suitable amendments in the Indian Companies Act. The recommendations of this Special Officer were examined by an Advisory Committee and later considered by the Government of India in 1936. Public opinion was also invited and the final suggestions took the form of an Amending Bill in 1936. This Bill was passed into an Act in the same year, and several far-reaching changes were made in the provisions relating to managing agents and banking companies. The accounts provisions introduced by the Amending Act of 1936 are those incorporated in the 1913 Act as sections 130, 131, 131A, 132, 132A, 133, and sections 144 and 145 of the Act and compulsory regulation 107. The books of account were to contain particulars of all sums of money received and expended by the company and matters in respect of which the receipt and expenditure took place and in respect of all sales and purchases of goods by the company and of the assets and liabilities of the company. It will be seen that the relevant section of the Act, viz., section 130, was thus completely recast by the Amending Act of 1936.

16 The requirements with regard to the annual balance sheet reproduced in substance the provisions of sub-section (1) of section 123 of the English Act of 1929. The original Act of 1913 did not contain any specific provision as to the laying of the balance sheet before the shareholders annually. This is now made explicit in the amended section. This section also for the first time made it compulsory for every company to have a profit and loss account, and it is worth mention that regulation 107 in Table 'A' was also made compulsory by the Amendment Act of 1936. This regulation enumerated the contents of the profit and loss account and together with sub-section (3) of section 132 laid down the form in which the profit and loss account should be cast. The form of the balance sheet—Form F—was also considerably modified—in fact it was completely redrafted—so that it required every company to disclose more details than it did in the past. A further change was that any person indebted to a company was not eligible to hold office as an auditor of the company. Section 145 more or less reproduced the salient features of the corresponding provisions of the English Companies Act, 1929.

Another important change introduced by the Amendment Act of 1936 was that it made it obligatory for the holding company to annex to its own balance sheet the accounts of its subsidiary company. A subsidiary company was so defined as to include a sub-subsidiary company. The shareholders of the holding company were also empowered to call for the inspection of accounts of the subsidiary company and the investigation of its affairs as if they were shareholders of the subsidiary company. Similar provisions were not inserted in the English Act, 1929, although now, according to the English Act of 1948, a subsidiary includes a sub-subsidiary.

APPENDIX V

(Paragraph 254 of the Report)

A Note on the Securities and Exchange Commission, United States of America*

[Prepared for the use of the members of the Sub-Committee of the Company Law Committee]

Securities and Exchange Commission (U S A)

Creation and authority—The Securities and Exchange Commission was created under its organic Act, the Securities Exchange Act of 1934, for the purpose of administering that Act and the Securities Act of 1933, which had been hitherto administered by the Federal Trade Commission. The scope of duties and powers of the Commission was extended through subsequent legislative enactments, viz the Public Utility Holding Company Act of 1935, the Bankruptcy Act (Chapter X), the Trust Indenture Act of 1939, the Investment Company Act of 1940 and the Investment Advisers Act of 1940. The objects underlying these Acts, and the Commission's functions under them, are discussed below.

Securities Act of 1933—This "truth in securities" law, designed by the Congress for the protection of the interests of investors and the public, required registration with the Commission of securities (other than exempt securities or offerings) proposed to be publicly offered and sold in *inter-state commerce* or through the mails. The purpose of registration is to make available to investors pertinent financial and other information necessary for the exercise by them of an informed judgment as to whether they should purchase the securities being offered or not.

Registration is effected through the filing of a registration statement with the Commission, for this purpose, the Commission has promulgated registration forms, applicable to particular types of issuing companies, and prescribed the nature and extent of information to be disclosed by them. The prospectus or selling circular, which must be made available to purchasers or persons receiving offers through the mails, must contain an accurate summary of the ultimate facts contained in the registration statement.

The registration statement and prospectus are subjected to detailed examination by the Commission as to the adequacy and accuracy of the information disclosed in them. If disclosures in the registration statement are found to be deficient in material respects, the Commission may give the registrant an opportunity to file correcting amendments or, if the circumstances warrant, may institute proceedings to deny or suspend effectiveness of the registration statement. The ultimate issue of a "stop order", in such a proceeding, operates to bar public offering of the securities until the registration statement has been corrected.

*Adapted from the Official Congressional Directory (for the use of the United States Congress)—United States Government Printing Office, Washington, 1949

It is to be noted that nothing in the Act empowers the Commission to disapprove or otherwise pass upon the merits of securities offerings. Accordingly, registration is not to be taken as a guarantee against loss. Instead, investors must judge for themselves, in the light of the information disclosed, whether the merits of the securities are such as to justify their purchase. However, severe penalties attach to the filing of false information. Further, if loss is incurred through the purchase of registered securities, the purchaser has a right of recovery against the company and the management and other responsible officials, if he can prove that representations as to material facts contained in the registration statement and prospectus are false or misleading.

Among the exemptions from the registration requirements of the Act, is one permitting the issue and sale, without registration, of securities in an amount not exceeding \$ 300,000. In regard to these issues, a simple letter of notification, together with sales literature, must be filed with the Commission.

In addition to the registration requirements applicable to public securities offerings, other provisions of the Act prohibit misrepresentation, deceit, and other fraudulent acts and practices, in connection with securities transactions generally, and the Commission is given important powers of investigation and enforcement in respect of them (including the right to compel testimony and subpoena records). In the exercise of these functions, facts elicited by these investigations which disclose *prima facie* evidence of fraudulent or other unlawful acts or practices may be used (1) in connection with court applications seeking an injunction against the continuance of such conduct, or (2) in criminal prosecutions (conducted through the Department of Justice) for wilful violations.

Securities Exchange Act of 1934—By this law, Congress extended to securities listed and registered in the national securities exchanges the principle of disclosure of information necessary for the protection of investors in their securities transactions. The prescribed information is obtained through the filing of an original registration application and subsequent periodic reports with the exchanges and the Commission by companies whose securities are so listed and registered (the periodic reporting requirement also extends to most companies registering new security offerings under the Securities Act). These are subject to examination by the Commission as to the accuracy and adequacy of the disclosures. Additional protective provisions of the Act require disclosure by corporate "insiders" of their holdings and transactions in equity securities of companies with listed equity securities, make their short-term trading profits in equity securities recoverable by the issuing company, and prohibit short selling by them. The solicitation of proxies in respect of listed securities is subject to regulation by the Commission in the interest of disclosure of pertinent information relating to the subject matter of the solicitation. The Act further directs the Board of Governors of the Federal Reserve System to prescribe Rules to prevent the excessive use of credit in securities trading, the relevant margin rules are administered by the Commission.

In addition, the Act sets up a comprehensive system for the regulation of trading in securities, both on the organised exchanges and

the over-the-counter markets, in the interest of investors and the public. Exchanges must register with the Commission, their rules and trade practices must conform to the provisions of the Act, designed to eliminate abuses and to assure the maintenance of just and equitable principles of trade, and the activities of the exchanges and their memberships are subject to the supervision of the Commission to the end that there shall be strict adherence to the law.

The provisions previously discussed for disclosure of information (through registration and periodic reports) do not apply to securities traded exclusively in the over-the-counter markets. However, as part of the regulatory process prescribed by the Act, brokers and dealers, engaged in over-the-counter securities business, must register with the Commission, and their business activities must conform to the prescribed standards of conduct. The National Association of Securities Dealers, Inc., an association of over-the-counter brokers and dealers, was organized and registered with the Commission under the so-called Maloney Act, passed in 1938, as Section 15A of the Securities Exchange Act, for the purpose of establishing and maintaining improved standards of conduct within the industry under the general aegis of the Commission.

This system of regulation is buttressed by prohibitions against market manipulations, misrepresentation or deceit, and other fraudulent acts and practices in securities transactions, whether in the exchange or in the over-the-counter markets. In addition to its powers of investigation and enforcement already discussed, the Commission is empowered by this Act to impose disciplinary measures against brokers or dealers who contravene the provisions of the Act. These measures include revocation of a broker's or dealer's registration with the Commission or, in the case of members of exchanges or of the dealers' associations, suspension or expulsion from such membership. Such action operates to deny, temporarily or permanently, the privilege of conducting their securities business in interstate commerce.

Public Utility Holding Company Act of 1935—This Act, which provides for the regulation of electric and gas public utility holding companies and their subsidiaries, was designed by the Congress for the protection of the interests of investors, consumers, and the public. It has a twofold objective: (1) regulation of the financial and other related activities of holding company systems, in the interest of eliminating the abuses which gave rise to the enactment of the law, and (2) adjustment of the incongruous results of past abuses by integration of physical properties, simplification of holding-company system and capital structure, and equitable redistribution of voting power among security holders.

In passing judgment upon the issue and sale of securities (if not exempt by virtue of State Commission jurisdiction), the Commission is directed to disapprove of such issue and sale, if the security is not reasonably adapted to the security structure and earning power of the issuing company, or is not necessary or appropriate to the economical and efficient operation of the issuer's business, if fees, commissions, or other remuneration are not reasonable, or if other terms and conditions of the issue and sale are detrimental to the interests of investors, consumers or the public. The purchase of utility securities and assets also requires approval by the Commission unless a State Commission has approved. Such an acquisition cannot be

approved if it tends toward inter-locking relations or concentration of control not in the public interest, if the consideration, fees, commissions, etc., are not reasonable, or if it unduly complicates the capital structure of the holding-company system or is detrimental to the integration requirements of the Act. Other provisions of the Act bring under the control of the Commission such matters as service sales and construction contracts, inter-company loans, dividends, sale of utility assets, proxies.

The second objective, constituting one of the most important Congressional mandates contained in the Act, is the requirement about simplification and integration. The Commission is directed to take such action as may be necessary to limit the operation of holding-company systems to a single integrated public utility system (except where special circumstances may permit the retention of one or more additional systems or incidental business) the utility properties of which are physically interconnected or capable of such inter-connection, and which may be economically operated as a coordinated system confined in its operations to a single area or region, and not so large as to impair the advantages of localized management, efficient operation, and the effectiveness of regulation. Companies' properties and interests, found by the Commission not to be retainable as part of any such system, must be divested from the system. Provision is made for voluntary company action to comply with the integration requirements of the Act, as well as with the simplification requirements.

The requirements of simplification provide for action to ensure that the corporate structure or the continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the system structure, or unfairly or inequitably distribute voting power among the security holders of such system. To this end, useless and uneconomical holding companies must be liquidated and dissolved, simple capital structures must be substituted for multiple-security structures, and voting power must be redistributed upon a fair and equitable basis in the light of existing equities.

Bankruptcy Act, Chapter X—Under Chapter X, the Commission has the duty of serving as adviser to United States District Courts, in connection with proceedings for the re-organization of debtor corporations in which there is a substantial public interest. Acting as a party to these proceedings at the request or with the approval of the courts, the Commission renders independent expert advice and assistance, not previously available to courts, because they do not maintain their own staff of expert consultants.

Of primary importance is the Commission's contribution to the formulation of re-organization plans for debtor corporations, which will meet the test of feasibility of placing the surviving corporation in a sound financial position to continue as a going concern, and the test of fair and equitable treatment of creditors and security holders. The latter calls for a determination of the value of the assets of the debtor, and of the rank and priority of claims there against. The claimants must be accorded full recognition in order of the legal and contractual priority of their claims, junior interests participating only if the value of the assets exceeds the amount of prior claims, in addition to assisting the trustees and other interested parties in the

formulation of re-organisation plans, the Commission's views on the feasibility and fairness of re-organisation plans are conveyed to the courts, either orally in the case of smaller cases or by means of advisory reports in the case of debtors with scheduled liabilities exceeding \$ 3 000,000

The Commission also participates in such matters as the qualifications and independence of trustees and their counsel, problems involving the administration of the estate, such as the sale of properties and interim distribution to security holders, reasonableness of fee allowances to parties and their counsel, and similar matters

Trust Indenture Act of 1939—This Act provides that the issue of bonds, notes, debentures, and similar debt securities, exceeding \$ 1,000,000 in principal amount, may not be offered for sale to the public unless they are issued under a trust indenture which conforms to specific statutory standards prescribed in the Act to safeguard the rights and interests of the purchasers. In addition to the requirements about conformity of the indentures to these standards, the Act contains provisions governing the eligibility and qualification of the indenture trustee, who as the representative of the security holders has the duty of seeing that the covenants of the indenture are adhered to by the issuing company. Among these, is a requirement that the trustee should be "independent" and free of any conflicting interests, which might interfere with the faithful exercise of his duties. Applications for the qualification of indentures are examined by the Commission to ensure conformity with the Act's requirements

Investment Company Act of 1940—Under this Act, companies engaged primarily in the business of investing, reinvesting, and trading in securities must register with the Commission, and certain of their activities are subject to regulation by the Commission, in accordance with standards prescribed as necessary for the protection of investors and the public. Transactions between affiliates, for example, are prohibited or made subject to prior Commission approval. Gross misconduct or gross abuse of trust by management officials may subject the individuals to removal by court order, upon application by the Commission. Advisory reports upon plans of re-organisation, merger, or consolidation may be prepared by the Commission for the information and guidance of security holders affected

Investment Advisers Act of 1940—Persons or firms engaged in the business of advising others with respect to their security transactions must register with the Commission under this Act. Their acts and practices must conform to prescribed standards, including a requirement for disclosing the adviser's interest in transactions executed for his clients. Various acts and practices which would constitute fraud or deceit are made unlawful

Corporation Reports—The Commission's files and records, made up of reports from approximately 2,400 corporations in 158 industry groups, having over 13,800 subsidiaries, contain financial and other information concerning such companies of great value to government, business, and industry as well as investors and the general public. These companies, by the size of their assets, represent over

50 per cent of the corresponding national total, and their reports are filed with the Commission. Severe sanctions are provided for against false reports.

Under a project entitled "Survey of American Listed Corporations", the reported data are tabulated by the Commission with the object of making them more readily accessible. Among the reports thus published both for individual corporations and by industry groups, are studies of the Return on Invested Capital, Balance Sheet Data, important items making up the profit and loss statement, quarterly sales data, and investment company data.

In addition, the Commission regularly publishes quarterly balance sheet and income account data for all United States manufacturing corporations, working capital data for all corporations, information on plant and equipment expenditures of business (both actual and planned), and information on individuals' savings. Monthly data on new securities offered for cash and securities traded on exchanges also are compiled and published.

